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REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME THIRD.

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M,DCCC,V.

PURCHASE
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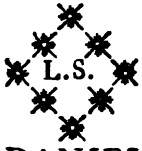
District of Virginia, to wit:



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WILLIAM MARSHALL,

Clerk of the District of Virginia.

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PAGE 24,	LINE 22,	read *were* inſtead of *was*.
56,	5,	read *to* after *refered*.
61,		three lines from the bottom leave out *to* after *beſtowing*.
64,	4,	read *conſtruing* for *conſtructing*.
72,	12,	read *entered* for *intered*.
115,		eight lines from the bottom read *that* for *the*.
119,	7,	read *extenſive* for *intenſive*.
120,		ſtrike out the inverted commas from line 19 to line 25.
125,	22,	read *commiſſioner* for *commioner*.
137,		five lines from the bottom read *be* for *they*.
142,	24 & 27,	read *deciſions* for *deſciſions*.
262,	8,	read *were* for *was*.
274,	19,	read *ſeparate* for *ſeperate*.
276,	3,	after *againſt* read *other*, and line 17 read *authority* for *power*, and line 20 read *founded* for *found*.
282,	10,	read *of* after *conſtruction*.
334,		eight lines from the bottom read *this* for *that*.
353,		eleven lines from the bottom read *vary* for *varies*.
397,		ten lines from the bottom read *that* for *it*.
400,		laſt line read *ſucceſsfully* for *reſpectfully*.
450,	22,	for *of* read *for*.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
APRIL TERM OF THE YEAR 1801.

BOGLE &c.

againſt

CONWAY's Ex'ors.

If in aſſumſit, the defendant plead the act of limitations, and the plaintiff would avoid the plea by a former ſuit having been brought in time, he muſt reply the former ſuit ſpecially, and cannot give it in evidence under a general replication to the plea.

BOGLE and others ſurviving partners of Robert Gilchriſt & Co. brought *indebitatus aſsumpsit for goods ſold and delivered*, againſt Conway's executor, in the Diſtrict Court. The defendant plead the act of limitations, and the plaintiff replied generally. Upon the trial of the cauſe the plaintiffs filed a bill of exceptions to the Courts opinion; which ſtated, that the plaintiffs, in order to rebut the plea of the act of limitaons, offered, in evidence, a record of the County Court of King George, in an action on the caſe, for goods ſold and delivered, brought by the plaintiffs againſt theteſtator of the defendants, in March 1774 *(ſetting it forth in hæc verba;)* and a certificate of the Clerk of the County Court in theſe words, "I do hereby certify that the above record "contains all the proceedings which appear to "have taken place in our Office in the ſuit Robert "Gilchriſt & Co. vs. Francis Conway, on a parti-

Bogle & Scott vs Conways ex'rs

"cular examination of the minutes; all the pa- "pers filed in the cauſe being put away in a bun- "dle indorſed *Britiſh ſuits* on the Docket, which "I ſuppoſe to contain thoſe ſuits which were af- "terwards ſuſpended:" that the defendants objected to the teſtimony; and that the Court would not permit it to be given in evidence to the Jury.

Verdict and judgment for the defendants; and the plaintiffs appealed to this Court.—

RANDOLPH for the appellants. It is clear there was a former ſuit, the trial of which was delayed: and the plaintiffs' ought to have been permitted to prove it.

BROOKE *contra.* If evidence, as to this fact, ought to have been received at all, the teſtimony offered was improper: For a copy of the record, and not the certificate of the Clerk, ought to have been produced. But no evidence, as to that fact, ought to have been received. For the plea was that the defendant did not aſſume within five years; to which the plaintiffs replied generally; and thus the parties were at iſſue, upon the ſingle point, whether the defendants aſſumed within five years, or not? So that the teſtimony had no relation to the iſſue, but was entirely collateral to it; and therefore the Court very properly rejected it. If the plaintiffs wiſhed to have availed themſelves of the evidence, they ſhould have replied the matter ſpecially, in order that the defendants might have joined iſſue with them on the point relative to a former ſuit, and have come prepared to diſprove it. Whereas the plan purſued, of producing the evidence at the trial of the other iſſue, was calculated to ſurprize the defendants. These principles are confirmed by *Brown vs. Putney* 1. *Wash.* 303 and *Wilcox vs. Huggins* 2. *Stra.* 907.

RANDOLPH in reply, If teſtimony on the point was admiſſible at all, then the evidence of

Bogle & Scott vs Conways ex'rs

fu.ed was sufficient; for even parol evidence might have been received to shew that there was no person capable of bringing the suit: But the facts were better authenticated by the document produced than they would have been by parol evidence, as it shewed a depending suit, and what steps had been taken in it, by the certificate of the officer who had the care of the papers. There was no necessity for a special replication, as the plaintiffs were at liberty to have offered any evidence, which went to shew that the suit was brought in time.

LYONS Judge—Delivered the resolution of the Court that there was no error in the opinion of the Court below; and therefore that the judgment was to be affirmed.

Judgment affirmed.

ELLIS *against* THILMAN.

In an action for malicious prosecution, it is not sufficient to alledge that the defendant did it *without any just cause*, but the declaration must state that it was done without *any probable cause*

THILMAN brought Case against Ellis for a malicious prosecution; and declared as follows, "John Thilman jun. complains of William "Ellis in custody &c. for that the said William "contriving and maliciously intending unjustly to "grieve, oppress, weary and impoverish him the "said John Thilman, and put him to great ex- "pence *without any just cause*, of his mere ma- "lice did lodge an information before a Court of "enquiry for the said County, (that the said John "Thilman had feloniously taken a negro, the pro- "perty of *him the said John Ellis*,) and thereby "caused the said John Thilman jun. to be arrested, "examined before a justice of the peace touching "the said felony, and afterwards to be commit- "ted for examination before a Court of enquiry

Ellis vs Thilman.

"for the said county, and the said information "was so falsely and maliciously prosecuted and "caused to be prosecuted against the said John "Thilman by the instigation of the said William "Ellis from the——day of————till afterwards "to wit, at a Court of enquiry held for the said "County of Caroline on the 16th day of May, in "the year of our Lord 1793 when he was acquit-"ted of the charge aforesaid, by reason of all "which premises the said John Thilman was re-"strained of his liberty and compelled to procure "bail for his appearance before the Court of en-"quiry, to spend large sums of money in his de-"fence, and was moreover greatly injured in his "good name fame and reputation to the damage of "the said John Thilman jun. of five thousand "pounds and therefore he brings suit &c." Plea not guilty; and issue. Verdict and judgment for the plaintiff for £120; and the defendant appealed to this Court.

WICKHAM for the appellant. It was not enough for the plaintiff to alledge that there was no *just* cause, but it should have been stated that there was no *probable* cause. For, although there was no *just* cause, if the defendant had *probable* cause, it was sufficient to excuse him. To say that it was maliciously done is not enough; for, if there was probable cause, it justified the defendant. Accordingly the constant practice is to aver that there was no *probable* cause. 6. *Mod.* 25. 73. 4. *Burr:* 1974. 1. *Term Rep.* 544. 2. *Term Rep.* 226.

WARDEN *contra.* The allegation that there was no *just* cause necessarily excludes the idea of any circumstance of justification. For if there was a probable cause, it could not be affirmed that there was no *just* cause. Just cause *ex vi termini* means proper cause; and, if there was a *probable* cause, there was proper cause; that is, a just cause. Consequently when the Verdict finds that there

Ellis vs. Thalman

was no juſt cauſe, and that it was maliciouſly done, it, in ſubſtance, finds that there was no *probable* cauſe. *Stra.* 691. 4 *Term Rep.* 248. 10 *Mod.* 214. *Gilb. Rep.* K. B. 185.

Cur: adv: vult.

LYONS Judge—Delivered the reſolution of the Court, that the plaintiff ought to have alledged the want of *probable* cauſe, and that the omiſſion was not cured by the verdict. Conſequently that the judgment of the Diſtrict Court was erroneous, and ought to be reverſed.

Judgment reverſed.

LYNE *againſt* GILLIAT.

GILLIAT brought *indebitatus aſſumpſit* againſt Lyne in the Diſtrict Court, and declared 1. for money laid out and expended; 2. upon an *Inſimul computaſſet.* Plea *non aſſumpſit*, and iſſue. Upon the trial of the cauſe the defendant filed a bill of exceptions, which ſtated "that "the Court refuſed to permit the defendant to "enter into a re-examination of the accounts on "which the ſettlement was founded, and confined "him to the pointing out errors on the face of the "ſettlement, eſpecially as the defendant was in "poſſeſſion of the firſt ſettlement, with all the ac- "counts between the parties, ſome months before "the ſecond ſettlement was made, and the objecti- "ons, the defendant propoſed to make, were to "the items of the accounts on which the firſt ſet- "tlement was made.—That the defendant alſo "offered to prove, by parol teſtimony, that he "ought to have had a credit, for part of the goods "charged in the account on which the firſt ſettle-

The defendant, in an action upon a ſettled account cannot go into an enquiry concerning the juſtice of the ſeveral items of demand ſtated in the account.

Lyne vs Gilliat

" ment was made, of eight, inſtead of ſix months, " ſo as to take off two months intereſt, but, as it " did not appear that he had given the plaintiff " notice of the laſt objection, the Court would not " admit the teſtimony." Verdict and judgment for the plaintiff; and the defendant appealed to this Court.

Per Cur: affirm the judgment.

COMMONWEALTH *againſt* GARTH.

Where the Auditor drew a warrant in favour of one of the County commiſſioners, the Court will preſume payment by the Treaſurer unleſs the warrant be produced or he otherwiſe diſcharges himſelf of the receipt.

THE auditor of public accounts moved the General Court for judgment againſt the defendant for £. 30 " alledged to have been erroneouſly paid him as a Commiſſioner in the County " of Albemarle for ſervices performed in the years " 1787, 1788, and 1789." The Court overruled the motion, *because no evidence was offered in behalf of the Commonwealth to prove that the warrant iſſued to the defendant was ever preſented to or paid by the treaſurer, or that the ſame hath ever been diſcounted for taxes, or otherwiſe ſatisfied or diſcharged.* From which judgment the auditor appealed to this Court.

NICHOLAS Attorney General. The Court will preſume payment of the warrant, as the defendant might have drawn the money at any time; and it is not ſhewn that he either has the warrant or that it hath been loſt. This preſumption will be the rather made, becauſe I am informed at the treaſury that they keep no account of theſe warrants, when paid in by the Sheriffs

and public officers, by which they can ſpecifically know them; but the ſame are deſtroyed.

Commonwealth vs Garth.

WICKHAM—ſtated that he had been employed by the commiſſioners to argue the general queſtion, whether they were entitled to the money or not; and if the Court ſhould be of opinion againſt the defendant on the point already made, that he wiſhed to be heard as to the right to the money.

ROANE Judge.—I think that the Court would have been juſtifiable in preſuming the payment; as the defendant did not appear and rebut the preſumption, by producing the warrant, or otherwiſe diſcharging himſelf from the receipt. Eſpecially as the treaſurer ſaid he had no means of diſtinguiſhing the warrants ſo as to aſcertain the payment expreſsly.

CARRINGTON Judge. I can never bring my mind to let all the commiſſioners ſhelter themſelves under ſuch a defence as this, if they are not entitled to the money. Therefore I think the other point ſhould be gone into.

LYONS Judge. I ſuppoſe it muſt lie over to be argued on the other point; but a man might have loſt his warrant, and not drawn the money.

NICHOLAS Attorney General. The queſtion is whether the appellee was entitled to the compenſation of £. 20? He clearly was not: for, although the act of 1790 ch: 16 ſtates that doubts had ariſen concerning it, yet a fair expoſition of the law will prove that the commiſſioners had no right to the money. The act of 1782 *ch: rev:* 178 gave the £. 20 as a compenſation to the old commiſſioners for copying and delivering of the book to the Auditors; but the act of 1786 page 9 conſtituted a new officer, and gave him no other reward than the ſix ſhillings per day.

Commonwealth *vs* Garth

WICKHAM *contra*. The auditor and the commiſſioners always acted upon the idea that the commiſſioners were entitled to the £. 20; and therefore a motion, which is in nature of an action *for money had and received*, will not lie; becauſe it was not againſt conſcience that the defendant retained the money. The various acts ought to be conſidered as one ſyſtem. That of 1786 was intended to give a compenſation in addition to what was given under the act of 1782; which allowed for copying and returning the book, making out lists &c: Whereas the ſix ſhillings is given by the act of 1786, for a different duty altogether. For the commiſſioners appointed under that act were merely ſubſtituted in the room of the old ones; and were not new officers, to every purpoſe, as the Attorney General would have it.—Conſequently the defendant, in receiving the £. 20, did not get a double compenſation; as he received it for different duties, and not for the ſame.

The Judgment was as follows;

"The Court is of opinion that the warrant for "thirty pounds, in the proceedings mentioned, "was by miſtake of the auditor, erroneouſly iſſued, "and delivered to the appellee as a commiſſioner in "the county of Albemarle, for ſervices performed "in the years 1787, 1788, and 1789, and that as "the appellee hath not returned the ſaid warrant, "it is preſumed that the amount thereof has been "paid by the Treaſurer, and that the ſaid judg-"ment is erroneous. Therefore it is conſidered "that the ſame be reverſed and annulled, and "that the commonwealth recover againſt the ap-"pellee the coſts expended, in the proſecution of "the appeal aforeſaid here, and the Court pro-"ceeding to give ſuch judgment as the ſaid Gene-"ral Court ought to have given. It is further "conſidered that the Commonwealth recover a-"gainſt the appellee the thirty pounds aforeſaid,

"and the charge of the notice, and the coſts of "the motion in the General Court."

MANDEVILLE & JAMESON, *againſt* PATTON & SCOTT.

PATTON and SCOTT brought an action of *assumpsit* againſt Mandeville and Jameſon in the huſtings court of Alexandria, and declared upon a note given by the defendants, wherein they promiſed to deliver to the plaintiffs *Wet goods and groceries to the amount of* 1800 *dollars at cash price, for value received of William Young.* Plea *non assumpsit:* Iſſue.

The aſſignee of a promiſſary note negotiable at the Bank of Alexandria, cannot offer it in diſcount to a ſuit brought againſt him by the aſſignor upon a note in writing to deliver to the plaintiff *wet Goods and Groceries* to a certain amount.

Upon the trial of the cauſe the defendants filed a bill of exceptions to the courts opinion, which ſtated that the defendants offered in evidence as an offset a note given by Fletcher and Ottway to the plaintiffs, and aſſigned by them to the defendants, which is in theſe words: —"1125 dollars "due July 20-23, Alexandria 21ſt, April 1797, "ninety days after date we promiſe to pay to meſſ. "Patton and Scott, or order, eleven hundred and "twenty five dollars value received, negotiable in "the bank of Alexandria." The bill of exceptions, after reciting the ſaid note, adds, "which note is endorſed by Robert Patton and Charles Scott and Theodorick Lee, and which aſſignment is in theſe words to wit, *Pay to the order of Mandeville & Jameson.*" The bill of exceptions then ſets forth *in hæc verba* a proteſt of the ſaid note on the 24th July 1797 for non payment, at the requeſt of the preſident and directors of the bank of Alexandria, by the notary public at Alexandria; that the plaintiff objected to the note's being given

Mandeville and Jameſon *vs* Pattton and Scott.

in evidence; and that the court would not permit it to go to the jury.—Verdict and judgment for the plaintiffs. The defendants appealed to the District Court where the judgment was affirmed; and from the judgment of affirmance the defendant appealed to this court.

RANDOLPH for the appellant. The court ſhould have ſuffered the evidence to go to the jury, to have had as much weight as they might have thought proper to give it; becauſe they would have diſregarded it if there was delay in the aſſignees; and ſo no inconvenience would have reſulted from the reception of it: Whereas the courſe purſued was calculated to produce great injury to the defendants; for, if they were guilty of no delay or other fault, the note ought to have been diſcounted, as the plaintiffs were liable in conſequence of the failure of the makers to pay. This argument is the ſtronger on account of the note's being made negotiable at the bank of Alexandria; which made the aſſignors liable like the indorſors of an inland bill.

BOTTS *contra.* The defendants were not entitled to the diſcount, without having, previouſly, ſued the maker, LEE *vs.* LOVE in this court.* For that caſe not only decided that a ſuit was neceſſary, but that the note's being made negotiable at Bank created no difference: And the true conſtruction of the act eſtabliſhing the bank always has been that it applied only between the Bank, and thoſe having tranſactions with them.

Cur adv. vult.

LYONS Judge—Delivered the reſolution of the court, That there was no error in the judgment of the Huſtings Court in rejecting the evidence; and therefore that the judgment of the Diſtrict Court was to be affirmed.

* 1. *Call*

JETT, *Executor of Bernard,* *againſt* BERNARD.

A widow taking a legacy under the will, ſhall abate in proportion with the other legatees.

WILLIAM BERNARD, among other bequeſts to his wife, deviſed her a legacy, in the following words, "*Item*, out of my crops "of tobacco and tobacco debts, I deviſe to my "wife forty thouſand weight, to enable her to "purchaſe a carriage, and to ſupply her with ſuch "neceſſaries as ſhe may be in want of." And among other bequeſts, to his ſon Richard Bernard he deviſed him a legacy in theſe words: "I alſo "give to him, to ſupply himſelf with neceſſaries, "twenty thouſand pounds of tobacco, out of my "crops and outſtanding tobacco debts." Of which will he appointed his ſon Richard one of the executors, who alone qualified. After the deaths of the ſaid Richard Bernard, and of the teſtators ſaid widow, her ſon and adminiſtrator brought a ſuit againſt Jett as executor of the ſaid Richard Bernard, and among other things, claimed the balance of the 40,000 weight of tobacco deviſed to her as aforeſaid. Upon a reference to the commiſſioner it appeared that there was not fund enough to pay both the above legacies, but he, being of opinion that the widow was firſt entitled, and that the deficiency aroſe from the miſconduct of the executor, charged the defendant with the balance of the ſaid legacy and intereſt. The defendant excepted to the report; and the Court of Chancery being of opinion that if the fund was not ſufficient to pay both the legacies, and the deficiency was not occaſioned by the default of the executor, the legacies ought to abate proportionally, directed a jury to inquire whether the deficiency was occaſioned by negligence or other default of the executor. There being other parts of the decree with which Jett was diſſatisfied, he appealed to this court.

Jett vs Bernard.

WICKHAM and WARDEN for the appellee, *contra*. The legacy to Mrs. Bernard ought not to abate; becauſe ſhe receives it in lieu of her third part under the act of Aſſembly. In the caſe of *Burridge* vs *Bradyl*. 1 *Wms*. 127, it was expreſsly held that where the wife releaſed her dower for the legacy, it ſhould not abate; and the reaſon is the ſame, where the releaſe is wrought by operation of law. For ſhe cannot have the legacy and her thirds too: and the taking the legacy deſtroys her claim to a third part of the eſtate, under the act of aſſembly.

CALL for the appellant. The legacies to Mrs. Bernard and Richard Bernard ought to be paid proportionably, out of the tobacco which has been collected; becauſe the reſidue of the debts being doubtful originally, the fund is likely to prove defective for payment of both; and therefore juſtice requires that the legacies ſhould abate in proportion. The caſe of *Burridge* vs. *Bradyl* is a ſingle caſe; it was decided on the ſpecial circumſtances; and does not eſtabliſh the general principle contended for: Beſides it was, probably, a caſe of compaſſion, and therefore it would be too much to found a rule of property on it; eſpecially as, in that caſe, there was an expreſs releaſe of the dower for the legacy, which was a beneficial conſideration paid for it. But here there was no ſuch conſideration; becauſe if ſhe had taken her thirds, they would have been ſubject to the ſame abatement; and therefore ſhe loſt nothing by taking the legacy; for it is only making the abatement upon the legacy, inſtead of making it on the diſtributive ſhare. But what is deciſive, in the preſent caſe, is, that the teſtator ſhewed the ſame deſire for the payment of both legacies. For they are both given in the ſame language: In both it is to buy ſuch *neceſſaries* as the legatee may ſtand in need of: which diſcovers an equal deſire that both ſhould be ſatisfied, and repels the idea of a preference in the payment.

Cur adv. vult.

LYONS Judge—Delivered the resolution of the Court, that there was no error in the decree; and, consequently, that it was to be affirmed.

Jett *vs* Bernard.

Decree affirmed.

WASHINGTGN, *Against* SMITH.

A forthcoming bond given by the defendant only, without any security, will support a motion, & judgment will be rendered on it, in favour of the plaintiff.

A FORTHCOMING bond was taken without any security, and the District Court gave judgment on it in favor of the plaintiff upon a motion. From this judgment Washington appealed to this Court.

Per cur: Affirm the judgment.

FITZHUGH, *against* FOOTE.

An assignment of dower in *lands and slaves* by order of the County Court by motion only, and without any suit for that purpose, not set aside after a great length of time but the inequalities and excess only corrected.

RICHARD FOOTE and William Haywood Foote filed a bill in the High Court of Chancery, against John Thornton Fitzhugh and Margaret his wife, stating, that Richard Foote the father of the plaintiffs died in 1778, leaving the plaintiffs infants of very tender years; and that the defendant Margaret, who was the testator's wife, alone qualified as executrix of his will:—That in 1780, she intermarried with the defendant John Thornton Fitzhugh; and, in September of that year, an order, for the assignment of her dower and thirds, was made by the county court of Prince William; but that no suit for that purpose was instituted, nor guardian appointed the plain-

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vs
Foote

When in dividing ſlaves it cannot be conveniently done without ſeparating infant children from their mothers, compenſation may be made in money.

Wife not entitled to money ariſing from land ſold by the huſband during his life time in lieu of her dower.

tiffs; and that their grandfather by the mother's ſide, did not, as the defendants pretend, pay attention to it on behalf of the plaintiffs; he being more attached to Fitzhugh than to their father: That in carrying the order of the county court into effect, the moſt valuable part of the lands (having all the improvements on it) were aſſigned for dower; which was not laid off by the county ſurveyor, but by Moffett the friend of the defendant J. T. Fitzhugh; and that more than a third part was aſſigned: That the allotment of the ſlaves and perſonal eſtates was alſo unfair and unequal, to the prejudice of the plaintiffs. The bill therefore prays that thoſe aſſignments may be ſet aſide, and others made; and that the plaintiffs may have general relief.

The anſwer ſtates, That the grandfather was appointed executor, and although he never qualified, yet he never renounced, but managed the eſtate during the defendant Margarets widowhood; and applied to the county court for the order of aſſignment: That the dower and thirds were laid off in his preſence, without the interference of the defendant, who did not procure Moffett to make the Survey; for it was the grandfather who did it; and he was influenced therein as well becauſe great part of the land lay in Fauquier, where Moffet lived, as becauſe of the great age of the ſurveyor of Prince William: That the ſurvey was fair, and not more than a third part of the lands were aſſigned for dower; nor was the part aſſigned ſo fertile as the reſidue: That the allotment of the ſlaves was not unequal at the time, although from ſubſequent cauſes, as deaths, births, &c. it may have become ſo: That the order of the county court was agreeable to the uſage of the country; and the aſſignments, under it, fairly, equally, and impartially made.

Several witneſſes were examined as to the value of the aſſignments; and the High Court of Chance-

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ry appointed commiſſioners to view and examine the dower lands, and to correct the exceſs, if any; as alſo to examine into the allotment of the ſlaves, and, if the widow received more, than her *due ſhare*, to allot her *one equal third part of the whole ſtock of ſurviving ſlaves*; and in both caſes to eſtimate the compenſation which ought to be made the plaintiffs, for the exceſs.

The commiſſioners reported that there was an exceſs, as to quantity, in the dower lands; which they had corrected: that all the valuable improvements were upon thoſe lands; and that they had left them ſtill attached to the new aſſignment; but had diminiſhed the quantity: That they had aſſeſſed a yearly rent, as well for the original exceſs in quantity, as for the additional ſurplus, ariſing from the reduction under the new aſſignment: That the exceſs of quantity, under the firſt aſſignment, did not proceed from the miſconduct of Fitzhugh, or the grandfather, but from an accidental defect in the ſurvey; and that there was an exceſs of £ 30: 10 in the value of the dower ſlaves.

The Court of Chancery confirmed the correction in the dower lands; and made the following decree with regard to the ſlaves.

" That the court doubting, at leaſt, the power " thereof to compel the ſons of Richard Foote to " accept a compenſation for exceſs in value of the " ſlaves aſſigned to Margaret Fitzhugh for dower, " whereas a diviſion of the ſtock of ſlaves them- " ſelves, if it be not unequal, is indubitably ſanctifi- " ed by law, doth, after hearing counſel, adjudge, " order and decree, that the ſaid ſlaves ſhall be " divided into three equal parts; that of thoſe " parts be alloted, one to John Thornton Fitz- " hugh and Margaret his wife, and the other to " the ſons Richard Foote and William Haywood " Foote, and that John Fitzhugh and Margaret

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"his wife account with Richard Foote and William Haywood Foote for so much of one third part "of the said profits as exceeds her proportion of "those profits."

From which decree the defendants appeal to this court.

WICKHAM for the appellant. The Chancellor ought not to have set aside the allotment of dower altogether, but should have corrected the excess only, as was done, at common law, in the writ of admeasurement of dower. *Fitzherb. Nat. Br.* 149. The practice of the country, at that time certainly, and perhaps even now in a great measure, was to make these summary applications to the court for dower; and no inconvenience resulted from it; for the same justice was done, as if there had been a friendly bill and answer drawn; because the parties interested always attended when they were of full age, and, when minors, some of their friends attended for them: added to which the Court always exercised the same controul over the allotment in the one case as in the other. In the present instance the executor attended and sanctioned the act. The conduct of Fitzhugh and his lady was perfectly fair, and has, indeed, operated to the benefit of the estate. If the dower is better than the orphans shares, it has happened from accidental causes subsequent to the allotment. Therefore the enquiry as to the excess should only be at the time of the allotment, and not at any subsequent period; for the former allotment was made when the slaves were all alive and before the Commissioners: This gave them an opportunity of judging of their value, which future Commissioners cannot have. It was better to assign the dower all in one tract, than to have given the dowress parts in several tracts. This was more convenient both for herself, and for the estate. Because the other mode would have obliged her to have disturbed the purchasers, and would have

turned them upon the eſtate; which would have been far more inconvenient than the plan which was purſued. The lands allotted to the heir were timber lands, daily growing in value; and therefore better for him, than thoſe which were cut down.

RANDOLPH *contra.* The County Court could not aſſign dower in this ſummary way; for it was contrary to the principles of natural juſtice, as the other parties had no opportunity of being heard. The event proves the propriety of the argument; for the allotment was every way unequal. There is no ſimilitude between the writ of admeaſurement and this caſe. Eſpecially as that was only applicable to lands, which are permanent in their nature, whereas ſlaves are liable to conſtant fluctuation.

Per Cur: The Court is of opinion that the appellant Margaret is entitled to dower in all the ſlaves whereof her former huſband Richard Foote was poſſeſſed at the time of his death, as the ſale of any of them was not neceſſary for the payment of his debts: and therefore that the Commiſſioners, appointed by the Court of Chancery to inquire whether more ſlaves were retained by the ſaid Margaret than ſhe was entitled to for dower, ought, in the valuation of all the ſlaves of the ſaid Richard Foote which was made by them, to have aſcertained the value of the widows third part of the ſaid ſlaves, to have included the value of the ſlave Lucy, ſaid to have been appointed for, and delivered to Mrs. Alexander the daughter of the ſaid Richard, which they omitted to do:— That an equal diviſion of ſlaves, in number or value, is not always poſſible, and ſometimes improper, when it cannot be exactly done without ſeparating infant children from their mothers, which humanity forbids, and will not be countenanced in a court of Equity: ſo that a compenſation for exceſs muſt, in ſuch caſes, be made and received in

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money: And that, under all the circumſtances of the preſent caſe as ſtated in the proceedings in this cauſe, between children and parents, a new diviſion of the ſlaves of the ſaid Richard Foote ought not, after ſuch a length of time, for a ſmall exceſs, to have been ordered; eſpecially as the whole of the dower ſlaves with their increaſe will belong to the appellees, on the death of the ſaid Margaret their mother; ſo that only a reformation of that which was wrong ought to have been decreed, and a return or delivery of a part of the ſlaves to the value of the exceſs, if that could be properly done, accounting alſo for profits as uſual in ſuch caſes, or, if that could not have been properly done, then a ſatisfaction in money, or in payment of intereſt for the amount of ſuch exceſs, ſhould have been directed: That the commiſſioner be directed to correct the error in the valuation of the whole ſlaves of the ſaid Richard Foote, by adding thereto the value of the ſlave Lucy, and in caſe an exceſs ſhall then appear, to report whether the ſame can be rectified by a delivery of one or more of the dower ſlaves retained by the ſaid Margaret, to the appellee, to the value of the exceſs; and, if that can be reaſonably done, then they are to name the ſlave or ſlaves, and the appellants to be decreed to deliver to the appellees ſuch ſlave or ſlaves, and account for profits from the time the appellees were entitled to the poſſeſſion of their reſpective ſhares of the ſlaves of the ſaid Richard Foote; or if the exceſs cannot be reſtored, or rectified, in that manner, then that a compenſation in money be decreed to the appellees:—That the claim of the appellants to one third of the money received from the eſtate of —— Grayſon for land ſold by the ſaid Richard Foote in his lifetime, and charged by the appellant J. T. Fitzhugh to the eſtate of the ſaid Richard in the year 1784, ſhould not be allowed, unleſs the appellants can prove themſelves entitled to it under ſome contract or agreement with the parties intereſted, that the ſame ſhould be paid to

them in lieu of the dower of the ſaid Margaret in the land ſo ſold by the ſaid Richard Foote, and that the ſaid account be rectified accordingly: That ſo much of the ſaid decree as is declared to be erroneous be reverſed, and the reſidue affirmed; and that the cauſe be remanded to the High Court of Chancery for further proceedings to be had therein according to the principles of this decree.

Fitzhugh *vs* Foote.

MACKEY, *againſt* FUQUA.

THOMAS MACKEY ex'or of Samuel Mackey brought debt in the County Court of Charlotte againſt Joſeph Fuqua, William Fuqua and Richard Booker, and declared upon a bond given by them to the plaintiff, with a condition thereto which ſtated, "that whereas the above "bound Joſeph Fuqua jun. hath inſtituted an ac- "tion of debt in the Diſtrict Court of New Lon- "don againſt the ſaid Thomas Mackey executor "of Samuel Fuqua dec'd. and the ſaid William "Fuqua hath alſo inſtituted another action of debt "in ſaid Court againſt the ſaid Thomas Mackey "executor as aforeſaid, and the ſaid Joſeph Fuqua "hath inſtituted another action of debt in ſaid "Court againſt Moſes Fuqua in the ſame caſe, "and the ſaid Thomas Mackey executor of Samuel "Fuqua dec'd. hath this day advanced and deli- "vered unto the ſaid Joſeph Fuqua jun. and Wil- "liam Fuqua the ſum of two hundred and eigh- "teen pounds two ſhillings and two pence one "farthing, current money of Virginia. Now if "the ſaid Joſeph Fuqua jun. and William Fuqua "ſhall recover in the ſaid ſuits, they ſhall credit "the ſaid judgment or judgments by the amount "of the ſaid money advanced with intereſt thereon "from this date, provided they recover ſo great

If in a ſuit upon a bond with condition that if the pl'tffs ſhall be caſt in two ſuits, then depending, the obligor will pay &c: it appears that the pl'ffs had inſtitut'd ſuits upon adm'n bonds, this evidence will maintain the declaration.

If there be two iſſues, & the Jury are ſworn to try the *Iſſue* it is no error.

Mackey vs Fuqua.

"a ſum as the half thereof to be equal to the a-
"mount advanced, the application of the ſaid ad-
"vanced money with intereſt thereon from this
"date to go in diſcount of half the amount of ſaid
"judgment or judgments, and the ſame to be a
"full diſcharge for the ſaid Thomas Mackey ex-
"ecutor as aforeſaid againſt the ſaid judgment or
"judgments, but ſhould the ſaid judgment or
"judgments not amount to double the ſum ad-
"vanced, the balance of the ſaid advanced money
"to be repaid by the ſaid Joſeph Fuqua jun. Wil-
"liam Fuqua and Richard M. Booker, or either
"of them, to the ſaid Thomas Mackey executor
"as aforeſaid on demand. And moreover in caſe
"the ſaid Joſeph Fuqua jun. and William Fuqua
"ſhall be caſt in the ſaid ſuits, they ſhall, as ſoon
"as the ſaid ſuits are determined, pay to the
"ſaid Thomas Mackey executor of Samuel Fuqua
"dec'd. the aforeſaid ſum of two hundred and
"eighteen pounds two ſhillings and two pence
"farthing with intereſt from the date." The declaration avered that the ſaid Joſeph Fuqua jun. and William Fuqua jun. were caſt in the above mentioned ſuits on the —— day of —— in the year 1794, at which time the aforeſaid ſuits were finally determined by the judgment of the Diſtrict Court of New London in favour of the ſaid Thomas Mackey executor of Samuel Fuqua deceaſed; whereby an action hath accrued &c. Pleas *payment* and *conditions performed*—Iſſue.

On the trial of the cauſe the defendant filed a bill of exceptions to the courts opinion, which ſtated that the plaintiff offered in evidence the copies of four non-ſuits in the Diſtrict Court of New London two of which were in ſuits between the juſtices of Charlotte county, for the benefit of William Fuqua, and two between the ſame juſtices for the benefit of Joſeph Fuqua plaintiffs, and Thomas Mackey executor &c. of Samuel Fuqua deceaſed, defendant, in debt. That the plaintiff likewiſe offered in evidence the bond

aforesaid. That the defendant objected to the evidence; but the objection was over-ruled and the said copies of the non-suits and the said bonds permitted to go in evidence to the jury. Mackey *vs* Fuqua.

Verdict and judgment for the plaintiff; to which judgment the defendant obtained a writ of supersedeas from the District Court, upon a petition which assigned for error 1. That the damages laid in the declaration did not agree with those in the writ, and exceeded the debt— 2. That there was a variance between the declaration and bond, in using the word *they* instead of *the*. 3. That although there were two issues in the cause, yet the record states that the jury were charged to try the *issue*. 4. That it did not appear by the said copies of the non-suits that the defendant in the *supersedeas* had instituted such suits, or that he had failed therein, as the justices of Charlotte were the plaintiffs and ordered to pay the costs, and not the defendant in the supersedeas. 5. That the jury have assessed damages to the plaintiffs testator, and the Court has rendered judgment for the plaintiff.

The District Court reversed the judgment of the County Court, because the suits in New London District Court *were not finally determined on the merits, when the present suit* was commenced. From which judgment of reversal the plaintiff appealed to this Court.

RANDOLPH for the appellee. There are two issues in the cause; one *conditions performed*, the other *payment*: and the last has not been tried. Besides the copies of the records do not shew that those were the suits mentioned in the condition of the bond; and the defect ought to have been supplied by other evidence. But as this has not been done there is variance between the evidence offered and the declaration. At least it does not appear that the suits are the same with those refer-

Mackey vs Fuqua.

ed to in the condition, and ſtated in the declaration.

CALL *contra.* The language in the record, that the jury were charged upon the Iſſue inſtead of the iſſues is a miſpriſion of the Clerk; and the jury, in finding that the defendants have not performed the conditions of the bond, have in effect, found the non payment of the debt. Beſides the verdict, which is recited in *hæc verba* in another part of the record, is that the jury find for the plaintiff and aſſeſs his damages; and not that the defendants have not performed the conditions. This makes the obſervation relative to the miſpriſion, more manifeſt. As to the other point it was matter of demurrer to the evidence, but not a ground of exception. Upon the face of the writs it appeared that two of the ſuits were for the benefit of William Fuqua, and two for the benefit of Joſeph Fuqua: and that the names of the Juſtices was matter of form.

Cur adv. vult.

LYONS Judge—Delivered the reſolution of the court, that the Judgment of the Diſtrict Court was erroneous, and that there was no error in the Judgment of the County Court.— Conſequently that the Judgment of the Diſtrict Court ſhould be reverſed, and that of the County Court affirmed.

BREWER *againſt* HASTIE.

If the anſwer admits dealings, and the commiſſioner reports a balance due, without exception before

HASTIE and company merchants and partners and Britiſh ſubjects, filed a bill in the High Court of Chancery againſt Brewer praying an account and relief for money due for dealings with Lindſy their factor in Virgina before the revolution. The anſwer admitted dealings to a con-

Brewer vs Buchanan Haſtie & Co.

ſiderable amount, but alledged that Brewer had paid conſiderable ſums of money and tobacco towards the diſcharge thereof, and had frequently ſolicited the plaintiffs factors and agents for a final ſettlement, which they did not comply with until the year 1774 or 1775, when one Burt preſented an account, which upon examination the defendant found to be incorrect, and ſets forth ſome credits which he claims. That upon receipt of the account rendered by Burt he went to Petersburg prepared to ſettle and diſcharge the balance, but, upon enquiry, found that the plaintiffs agents had all left the country.

There are no documents or evidence filed in the cauſe except a copy of the plaintiffs account.

The Court of Chancery refered the accounts to a commiſſioner, who reported a balance of £ 226 : 13 : 8 due the plaintiffs, with intereſt from the 1ſt September 1775.

No exception to this report was taken either in the commiſſioners office or in the Court of Chancery; and that court confirming the report decreed payment of the balance reported due with intereſt as aforeſaid. From which decree the defendant appealed to this court.

DUVAL for the appellant. There was no evidence of the debt; for the anſwer does not admit the amount, but merely that there had been dealings between the parties; and therefore the appellees were not entitled to a decree for any ſum. However, be that as it may, the decree was clearly wrong in allowing intereſt during the war; as the plaintiffs were Britiſh ſubjects, who by their own bill ſhew that they were out of the commonwealth; and the anſwer ſtates that the defendant was deſirous of a ſettlement, but could not obtain it.

CALL *contra*. The anſwer admits that there

him, or in the court of Chancery, the def't cannot object that there was no evidence of the debt in the court of Appeals.

Intereſt during the war deducted from a debt due a Britiſh ſubject reſident abroad.

Intereſt not to be carried down beyond the date of the decree.

Brewer vs Buchanan Haftie & Co.

were dealings and tranſactions, and only claims credit for ſome tobacco's and grain; which virtually amounts to an admiſſion that the items ſtated in the plaintiffs account were really furniſhed; eſpecially as the account is referred to, and made part of the bill. Beſides upon the taking of the account before the commiſſioner, the defendant appeared, his allegations were heard, a report made, and no exception taken either before the commiſſioner or in the Court of Chancery. After which it is too much to deny the exiſtence of the debt. As to the queſtion of intereſt, that is ſubmitted to the judgment of the court upon the law.

Cur adv. vult.

LYONS Judge—Delivered the reſolution of the court, that there was no error in the decree as to the debt; but that it was erroneous in allowing intereſt during the war, according to the caſe of *M'Call* vs. *Turner* * in this court; and that the decree was likewiſe erroneous in continuing the intereſt, after the date of the decree. That conſequently the eight years during the war was to be deducted, and the intereſt to be carried down to the time of the decree only, as was done in *Deans* vs. *Scriba*, § and *Deans* vs *Kunkall*, at the laſt term.

The decree was as follows;

" The Court is of opinion that there is error in " the ſaid decree in allowing to the appellees inte- " reſt on the ſum recovered for the eight years " during which the war continued between the " United States and Great Britain, and during " which the appellees who are Britiſh ſubjects, " were non reſidents within this commonwealth,

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* 1. *Call*

§ 2 *Call.*

"and no payment or tender could have been made "to them; and alſo in continuing the intereſt to "the time of payment inſtead of to the time of the "decree, and making the recovery to be of the "aggregate of principal and intereſt."

Bowyer vs Buchanan Haſtie & Co.

CHISHOLM,

againſt

STARKE, & Al.

A. deviſes ſlaves to his wife for life, remainder to his children. The wife marries B. who empowers C. to ſell the ſlaves. C does ſell them to D who was ignorant of the right of thoſe in remainder; and D, ſells them to E. If the remainder men bring a bill of *quiati met* againſt B. D & E, the court will decree B. to give ſecurity for the forthcoming of the ſlaves at the death of his wife; but as D. was a purchaſer without notice, he will not be compelled to give ſuch ſecurity.

THIS was an appeal from the High Court of Chancery. The bill ſtates that James Underwood, the father of the plaintiffs, Ann Starke, and Martha Underwood, who live in the city of Richmond, died in 1773, having firſt made his will, and thereby deviſed, as follows: "I lend "to my loving wife Ann, the uſe, labour, and "profits of one third of my ſlaves, during her na-"tural life; my will and deſire is that the dower "ſlaves of my loving wife Ann (meaning the third "lent to her as aforeſaid) may be equally divided "at her deceaſe amongſt all my children." That the ſaid Ann took poſſeſſion of a third part of the ſlaves, which have greatly increaſed, but, through the ſeverity of her, and her ſecond huſband William Richardſon, (of Hanover county,) they are reduced to three: That the ſaid Ann is conſumptive, and Richardſon in danger of inſolvency; and that conſcious thereof, he has frequently endeavoured to ſell the ſlaves as his abſolute property. In purſuance of which, he empowered Burnett to ſell one, by the name of Judy. That Burnett ſold her to Chiſholm, who lives at a great diſtance up the country, for £ 50, the eſtimated value of the full property of ſuch a ſlave. That Richardſon has attempted to ſell others; and pretends, that the increaſe of the ſlaves is his. The bill there-

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fore prays, that Richardſon and Chiſholm may give ſecurity for the forthcoming of the ſlaves, at the death of the ſaid Ann; and for general relief.

The anſwer of Richardſon and wife admits the will; but denies the ſeverity; ſtates, that the defendants thought until now, that the increaſe was theirs, as part of the profits of the ſlaves; but ſubmits the conſtruction of the will to the court. Admits the ſale of Judy; but it was only meant to ſell the right of the defendants; and, if more was done thro' miſtake, the plaintiffs cannot complain, as after this diſcovery, they may recover of Chiſholm; Inſiſts that no ſecurity ought to be decreed.

The anſwer of Chiſholm ſtates, That, in April 1796, Burnett came into the defendants neighbourhood (about 40 miles from Richardſon's,) and ſold the ſlave Judy for £ 50, (which is her full value,) to the defendant, under a power from Richardſon; whom, the defendant then ſuppoſed, to be the true owner. That afterwards, and before the defendant had the leaſt intimation of the ſuit (if it were then commenced,) he ſold the ſaid ſlave to Peebles, for £ 60.

There are in the record Richardſon's power of attorney; Burnett's bill of ſale; and a copy of Underwood's will, which contains the above recited clauſe exactly, but in a latter part thereof the teſtator deviſes the ſlaves to be equally divided, at his wifes death, among all his children, and Anna Underwood. The cauſe was heard by conſent, on the bill, anſwers, and exhibits; but the replication does not appear to have been withdrawn.

The Chancellor decreed, that Richardſon ſhould give bond in the penalty of £ 500; conditioned for delivering to the plaintiffs, the ſlaves in his poſſeſſion, and their increaſe, living at the death of the defendant Ann his wife. And that Richardſon and Chiſholm ſhould give bond, in the penalty of £ 500, for delivering Judy and her increaſe.

From this decree, Chiſholm appealed to this Court.

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CALL for the appellant. Peebles ought to have been a party; becauſe his title was drawn into queſtion; and it was in his power to have produced the ſlave, but Chiſholm could not. Chiſholm acted innocently, & committed no fault; for he did not know of the plaintiffs claim at the time of his own purchaſe, or of the ſale, which he afterwards made to Peebles; and therefore he ought not to be put to unreaſonable inconvenience. Under the circumſtances he is liable for nothing; but, at moſt, it can only be for the value at the time of the ſale.

RANDOLPH *contra.* There was danger that the property might be eloigned; and therefore the bill was proper. The notice is not poſitively denied; and the will was recorded; which was conſtructive notice. If a man once had poſſeſſion of another's property, he is liable to detinue, *Lambert* vs. *Burnley*,—1 *Wash.* 308: And therefore equity, where detinue cannot be immediately brought, will oblige him to give ſecurity for the forthcoming of the property. The argument on the other ſide, would lead to an infinity of ſuits.

Per cur: The Court is of opinion, that there is error in ſo much of the ſaid decree as orders the ſaid William Richardſon and the appellant to ſeal and deliver an obligation for the delivery to the appellees of the ſlave Judy named in the anſwers and the increaſe of the ſaid Judy, or ſuch of them as ſhall ſurvive the ſaid Ann Richardſon, the appellant having ſtated in his anſwer, which is not diſproved, that he was a fair purchaſer for a valuable conſideration, without notice of the title of the appellee's, and had ſold the ſaid ſlave Judy before ſuit brought or any notice of the the appellees claim to, or intereſt in, the ſaid ſlave. Therefore it is decreed and ordered that ſo much of the

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decree aforeſaid as is herein ſtated to be erroneous be reverſed and annulled; that the ſaid William Richardſon do with ſurety ſeal and deliver an obligation in the penalty of five hundred pounds payable to the appellees their executors adminiſtrators or aſſigns, with condition that the ſaid ſlave Judy and her increaſe, or ſuch of them as ſhall ſurvive the ſaid Ann Richardſon, ſhall be delivered to the appellees or their executors adminiſtrators or aſſigns; that the appellees biil be diſmiſſed as to the appellant; that the reſidue of the decree aforeſaid be affirmed; and that the appellees pay to the appellant his coſts.

CURRIE *againſt* MARTIN.

Quer: what certainty is required in an Entry for lands.

The party who caveats muſt ſhew a title to the warrant under which his own ſurvey is made.

MARTIN on the 28th May 1798, filed a Caveat againſt a patent to Currie as aſſignee of Henry Banks on a ſurvey of 2225 acres of land in Harriſon County, dated 30th November 1797, part of a warrant for 58400 acres entered the 11th of May 1784.— 1. Becauſe the entry does not expreſs the date and number of the warrant. 2. Becauſe the warrant did not exiſt at the time of the entry. 3. Becauſe the entry was not ſpecial enough. 4. Becauſe the land ſurveyed is not included in the entry. 5. Becauſe Banks had made a ſurvey, on the 27th of June 1785, on the ſame entry, and had obtained a patent thereon, and, at different times, had made other ſurveys, and obtained other patents on the ſame entry, before the making of the ſurvey caveated againſt. 6. Becauſe the ſaid ſurvey is entirely unconnected with the beginning of the ſaid entry and with the ſaid other ſurveys made upon the ſame entry, being ſeparated by many prior claims by ſettlement &c. The caveator ſtates his own claim to be founded upon an entry for 50 acres, made, the 7th of February 1797, by virtue of part of two warrants,

viz. 25 acres part of a land office treasury warrant of 2000 acres issued to Col. William M'Williams 8th May 1783, and 25 acres part of a pre-emption warrant of 1000 acres issued to John Goodwin jr. 28th March 1782.

Upon the trial of the cause, in the District Court, the parties agreed a case, which stated, That on the 7th of August 1783 a Treasury warrant issued to Henry Banks for 58400 acres, which is set forth in *hæc verba*. That on the 11th of May 1784 an entry was made with the surveyor of Monongalia county in the words and figures following. "*Capt. George Jackson for Henry* "*Banks enters a land office Treasury warrant of* "58400 *acres beginning at the mouth of the West* "*fork where it empties into the Tyger Valley river* "*and extending up the fork to Simpsons creek.*" That the land lying about the confluence of the rivers mentioned in that entry had been appropriated by settlements between the said rivers and have been patented upon such settlements. That in the year 1785 Henry Banks caused several surveys to be executed upon that entry for upwards of 13000 acres, leaving the residue unsurveyed, beginning between the rivers mentioned in the said entry above the lands granted to settlers without including the same, or commencing at the beginning of the said entry, and extending up the West fork towards and nearly to the mouth of Simpsons creek, and in the forks of the said rivers, and obtained patents for the same. That these surveys were made after the division of Monongalia county; which took place in consequence of the act of 1784, and thereby the lands in controversy fell into Harrison county. That after the said division the surveyor of Monongalia transmitted a copy of the said entry to the surveyor of Harrison county, who received the same, and, through mistake, entered it on his books, as of the 7th of May 1784. That on the 7th of February 1797 Daniel Martin made an entry with the sur-

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veyor of Harrison county in the following words; "Daniel Martin enters 50 acres, part of two warrants, viz. 25 acres part of a land office Treasury warrant of 2000 acres, No. 15721 issued to Col. William M'Williams the 8th of May 1783, and 25 acres part of a pre-emption warrant of 1000 acres No. 2412 issued to John Goodwyn jr. the 28th March 1782 on waters of Booth creek, beginning adjoining the land of John Martin and with his lines to join lands of Thomas Clare thence to join lands of William Tucker and George Wiseman;" which warrants were filed with the surveyor at the time of making the entry. That, in the year 1797, Henry Banks caused a number of other surveys to be executed upon the said entry, & assigned the same to the said James Currie; among which, the survey caveated was one. That the quantity of 58400 acres cannot be obtained in the forks of the rivers before mentioned by including all the lands as far up as the mouth of Simpsons creek, and extending the same distance up the Tyger valley river, that quantity being sufficient to take almost all the land between the said river and Simpsons creek, almost as far up as the sources of the said creek. That the warrant, on which the 58400 acres were entered for, was lodged with the surveyor of Monongalia, at the time of making the entry. That the *Caveator's* survey, or a part of it, is contained within the bounds of the survey caveated against. That the caveator made a survey, on his entry, upon the 8th of August 1798.

Upon this case the District Court gave judgment in favour of Martin; and Currie appealed to this Court.

CALL for the appellant. The entry is sufficiently certain; because it has a certain beginning; which is all that can be done in new countries, where there is nothing by which to describe fixed and ascertained limits with precision. The land,

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entered for, is deſcribed to be within certain natural boundaries. For the two rivers are to be purſued until the Monongalia comes to Simpſon's creek; and then along Simpſon's creek, until, if extended, it would ſtrike the Tyger-valley river; becauſe the lines were plainly to cloſe ſome how or other: and that Simpſon's creek ſhould form the connecting line, was the moſt natural and fair interpretation of the terms of the entry. It would be no objection to ſay, that this might poſſibly contain more land than the entry called for: becauſe every entry is liable to the ſame objection: but no entry was ever avoided upon that ground. The great reaſon for requiring certainty in the entry is, that other perſons may be enabled to locate without difficulty. But, in the preſent caſe, any other perſon might eaſily have located by this entry. For he would have had a certain beginning and natural boundaries, about which there could be no miſtake: In which reſpects the entry is much more certain than that of *Field* vs *Culbrait* § the other day, where there was no beginning, & the ſurvey did not even include ſeveral of the lines expreſſed in the entry; yet it was held ſufficient. This is in the true ſpirit of the law; which does not require a mathematical certainty, but a general deſcription and a reaſonable degree of certainty, *Hunter* vs *Hall* * in this court. For the law does not ſuppoſe that the exact boundaries can be given by the locator, but plainly intends that they ſhall be ascertained by the ſurveyor. In other words the law intends ſome things to be done by the locator, and others by the ſurveyor; that is to ſay, the locator is to name the place, and the ſurveyor is to take care of the boundaries. Therefore it is made the duty of the ſurveyor, and not of the locator, to ſee to the length and breadth of the plat; which plainly ſhews that the Legiſlature

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intended that the ſurveyor ſhould aſcertain the metes and boundaries, and not the locator; who is only to deſcribe the ſituation as well as he can.

Hence, in practice, no ſurvey, perhaps, has ever been found to agree preciſely with the entry, as was proved in a remarkable degree in the caſe of *Field* vs *Culbraith*. The Land Office has been examined, and few entries are found to contain more certainly than the preſent. So that as well upon principle, as upon a fair interpretation of the law, and the practice of the country, the entry muſt be deemed ſufficiently certain.

The next inquiry then will be whether as it appears that there were prior patents for ſome of the lands included within the entry, that circumſtance will render the entry void? And it is extremely clear that it will not. For it does not injure the rights of the prior ſettlers at all; becauſe their prior patents would always be a ſufficient defence, and a ſubſequent patent would avail nothing againſt them. Conſequently there can be no reaſon for obliging the locator to go through the immenſe labor and difficulty of laying a large warrant on the ſeparate parcels, when a general entry might ſerve every purpoſe as well. Beſides, in point of fact, it often has happened, and muſt hereafter, of neceſſity, frequently happen, that an entry does include ſome of the lands belonging to ſome other perſons: yet no entry was ever avoided for that reaſon. On the contrary the caſe of *Walcot* vs *Swan* * in this court, may be conſidered as an expreſs authority in favor of the entry. Becauſe, in that caſe, there were a great number of prior patentees within the bounds of the entry, and the decree directed thoſe parcels to be expunged, and the entry ſtood for the balance; which is deciſive of the principle.

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A third queſtion, which indeed grows out of that juſt diſcuſſed, is whether the firſt ſurvey did not ſatisfy the entry, ſo as to put it out of the power of Banks to make a ſecond ſurvey, upon the ſame entry? Or, in other words, whether he could ſurvey one parcel, then another, and ſo on *toties quoties* until his warrant was exhauſted, and his whole quantity completed? That ſuch ſeparate ſurveys may be made, ſeems neceſſarily to follow from the principles laid down in conſidering the laſt queſtion. For wherever there are incluſive prior ſettlements there muſt be ſeparate ſurveys, or you can never tell when the locator has got his quantity: So that the public might either grant more than enough, or the patentee receive leſs than he was entitled to. The moment therefore it is admitted that the entry may include prior grants, it follows, as a neceſſary conſequence, that there may be ſeveral ſurveys. For the quantity of unappropriated land cannot otherwiſe be aſcertained. Beſides the great object of the locator was to get the quantity of the land expreſſed in the entry; and therefore the ſeparate ſurveys will be conſidered as a continuation of the ſame operation, in order to effect it. In other words, they will be conſidered as parts of a whole, which could not be completed, without thoſe diſtinct operations.

It is no objection to ſay, that by this means large bodies of land may be engroſſed by men unable to ſurvey; or, worſe ſtill, that very large quantities of land may be protected againſt future locations, although the quantity really entered for, will fall far ſhort of that circumſcribed by the entry. Becauſe the ſurveyor may be called on to appoint a time, and give notice when he will ſurvey; which, if not attended to will avoid the entry, and entitle the ſubſequent locator; but, if attended to, will immediately aſcertain the quantity and boundaries.

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WARDEN *contra.* The entry was not ſpecial enough; for the boundaries are indefinite, and deſcribed with no preciſion: Since, if it be true, that Banks might go up one ſide of the fork to Simpſons creek, yet nothing is ſaid about the courſe which he is to take afterwards. Therefore although it ſhould even be admitted that he may go up the Weſt ſide of the fork, that is the Monongalia, to Simpſons creek, yet that does not decide where he is to ſtop on the Tyger valley river; for it does not appear where the creek connects them; and, from a view of the plat, it is extremely probable that it never does connect them at all: So that altough there may be an ultimate point on the Monongalia, yet there is none on the Tyger valley. Of courſe the entry cannot be ſaid to contain ſpace; or to circumſcribe any particular portion of land. Therefore, although it may be true, that if the entry had, in fact, contained more land, than the warrant called for, it would nevertheleſs be good, provided the land entered for had been accurately deſcribed and bounded, yet, as for want of a back, or connecting line, there is no ſuch deſcription, or definite boundary, the entry is eſſentially defective. Beſides it appears that the beginning was on private land, and the plain words and intention of the law, was, that the location ſhould be made on waſte and unappropriated land altogether. In which view of the caſe, the incluſive patents were perhaps ſufficient to avoid the entry. But the firſt ſurvey certainly ſatisfied the whole entry; for it never could have been the intention of the law to allow of *any number* of ſurveys; and the fair preſumption is, that when the locator has made a ſurvey, he has ſpecially deſignated the very land which he meant to appropriate.

DODDRIDGE on the ſame ſide. This Court has no juriſdiction of the caſe. The act of 1779 directs that *caveats* ſhall be tried in the General Court, and that the judgment there ſhall be final.

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Therefore when the Diſtrict Court law gives the ſame proceedings in caſes of caveat to the Diſtrict Courts as the General Court theretofore had, it follows that the judgment of the Diſtrict Court is to be final too; and conſequently the general clauſe, relative to appeals, will not give an appellate jurisdiction to this Court, in caſes of that kind. Which is the more evident from this circumſtance, that in the VI ſection of the Diſtrict act, (which declares the jurisdiction of thoſe courts,) mills, wills and roads are coupled with caveats; but in the ſection relating to appeals, mills, wills, and roads only, are mentioned; and nothing ſaid about caveats. Which looks as if the legiſlature had deſignedly omitted it, on the ground that the judgment of the Diſtrict Court, in conformity to that of the General Court formerly, was to be final; and that no appeal was intended to lie from it. Beſides the clerk is to certify all determinations of the Diſtrict Courts to the Regiſter; but nothing is ſaid as to the determinations of this Court.

The entry is not ſpecial enough, as it does not deſcribe all the boundaries; which ought to be done. For a deſcription of the *beginning* is not enough; but the locator ought to mark out the lines along which he means the ſurvey ſhall proceed; and although it is urged that this would be difficult in many caſes, that does not exclude the neceſſity of it; ſince a general deſcription of lines is not impracticable, but may be done with ſome degree of accuracy. If this be not neceſſary, the conſequence will be that all future locators will be in danger, or unable to tell where, or how, to make their entries; becauſe it will be impoſſible to know the extent and boundaries of the prior locations. The practice in making entries, when it is oppoſed to the poſitive requiſition of the act of Aſſembly, proves nothing; but, if it was important to conſider the practice, it would be found to be in our favour: For no entry, ſo uncertain as

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this, ever has been contended for. *Hunter* vs. *Hall* * turned upon other grounds, and the inferior courts have uniformly decided otherwiſe. So that, if the preſent entry is ſuſtained the inconvenience will be incalculably great; and innumerable titles will be ſhaken. It is monſtrous to call that a ſufficient deſcription of boundaries, which cannot be ſaid to expreſs more than a ſingle line; for the diſtance up the Tyger valley river is not attempted to be deſcribed, nor does it appear that Simpſons creek would, if infinitely extended, ever connect the two rivers. In point of fact, it is believed not to do ſo. Hence it is impoſſible to maintain, that the entry contains any parcel of land in particular; and therefore it does not ſatisfy the law, which requires a reaſonable preciſion; and ſuch an accurate deſcription, as that future locators may know how to make their entries, with ſome degree of certainty. Large and uncertain entries of this kind are contrary to the policy of the law; becauſe it precludes poor men from an opportunity of making entries, and acquiring ſettlements.

One ſurvey ſatisfied the entry; for ſeveral ſurveys cannot be executed on the ſame entry. The law no where ſays they may; but the language of the act always ſuppoſes a ſingle ſurvey: And, if practice be reſorted to, more than one ſurvey upon the ſame entry, never has been made. The neceſſity of theſe ſeparate ſurveys aids our argument concerning the uncertainty of the entry; becauſe it ſhews that the very certainty contended for on the other ſide, was only got by ſurveys and acts ulterior to the entry itſelf.

But the entry, if originally good, was forfeited for want of an earlier ſurvey. The act of October ſeſſion 1784. *Chap*: 48, page 7. required ſur-

* 1. *Call.*

veys previous thereto to be made before the firſt of the following February; and future ſurveys to be made within one year from the date of the entry. This act was in part repealed by the act of 1785 *Chap*: 41. page 31, which requires a previous notice by the ſurveyor; but then the owner of the entry is to appoint an agent in the County, and to give notice thereof to the ſurveyor; and, on failure, his entry is to become void. Therefore as the appellant has not ſhewn ſuch appointment and notice, his entry muſt be taken to have become void, according to the true conſtruction of this act. But by the act of 1786 *Chap*: 11 page 14, the time for appointing ſuch agent, and giving notice thereof, was extended for two years from the paſſing of the act of 1786; and by the act of 1788 *Chap*: 21. page 13, for two years more; after which it was no longer continued; and therefore the indulgence expired in the year 1790. For the act of 1790, page 8. relates only to failures to return the ſurveys, and to entries of another kind; which is likewiſe true of the acts of 1791 *Chap*: 4, page 5, & 1792. *Chap*: 7. page 31.: And although *Chap*: 8. in the ſame page, allows two years longer to make ſurveys, yet that will not ſave the forfeiture, on account of the failure to appoint the agent: Of courſe, it does not ſave the entry in this caſe. The ſame obſervation applies to the acts of 1794 *Chap*: 11. *Sect*: 2. page 9, of 1795 *Chap*. 9. *Sect*: 6. page 15. and of 1796 *Chap*: 47. page 29. So that the failure to appoint the agent within the time preſcribed, is not provided for; and therefore the entry of Banks was void for that reaſon.

WICKHAM in reply. This Court clearly has cognizance of the caſe: For the Diſtrict Court certainly has juriſdiction; and, by the laws conſtituting this Court, a general right of appeal to this tribunal, from the judgments of the Diſtrict Courts, is given to the citizen in all caſes: So that, as caveats are not excepted, it follows that they are included alſo.

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The entry is ſufficient. For reaſonable certainty, or certainty to a common intent, is enough. Mathematical preciſion cannot be required. It is not material that the bottom line does not connect the two rivers. For when the two ſide lines were given, the other could be found; and all that is required is, that the locator ſhall ſo lay his warrant as that future locators may be enabled to lay theirs with ſafety; which is done here. The bottom line could not be deſcribed, without a ſurvey; and therefore to ſay that it was neceſſary to deſcribe it, is to contend that a ſurvey ſhould always precede an entry. Whenever the ſurveyor has gone up the forks, at equi diſtances, ſo as to obtain the 58000 acres expreſſed in the warrant, he has arrived at the bottom line, and determines the ultimate points of the entry; obſerving, however, not to go beyond Simpſons creek on either ſide.

ROANE Judge. You ſay that quantity will give the bottom line: If ſo, and there be not the quantity of vacant land within thoſe equi diſtant points you ſpeak of, can you go beyond them in order to obtain the amount in your warrant? For if ſo, do you not contend that in one caſe the figure will be bounded by one bottom line, and in the other by another?

WICKHAM. My meaning is that the figure ſhall be certainly bounded by the equidiſtant points; and if there be not a ſufficient quantity of vacant land in it, that we cannot go beyond thoſe points to ſeek for it.

That the entry includes vacant land does not prejudice it; for that frequently happens, and never was objected to; which anſwers the objection that the entry begins on patented land; for if any part of it may be on patented land, the beginning may be ſo too: And, in point of practice, it has frequently been done.

One ſurvey did not ſatisfy the entry; and others might be made afterwards. This, which is a dictate of reaſon, is corroborated by the language of the act of Aſſembly; for that ſuppoſes various ſurveys upon the ſame warrant: which is convenient to the holder of the warrant; and prejudices nobody. In this point too the practice agrees with the reaſon of the thing, the fair interpretation of the act, and the convenience of the party.

The obſervation that there is danger, from this doctrine, that large tracts may be protected againſt ſubſequent entries, by perſons unable to ſurvey, is incorrect; becauſe the ſurveyor may be called on to give notice; and therefore the inconvenience, if any, may be eaſily avoided.

The length of time, between the entry and ſurvey, is not material, if the acts of aſſembly be fairly conſidered; but, upon that point, Mr. Randolph, who follows me, will ſpeak at large.

RANDOLPH on the ſame ſide. The Court has juriſdiction. For wherever there is a ſubordinate Court and a reviſing Court, the latter has a general ſuperintending power. This court has general appellate juriſdiction by the expreſs words of the act of Aſſembly; and as the caſe of caveats is not excepted, they alſo are included.

The entry is ſufficient. For only reaſonable certainty, or certainty to a common intent, is requiſite *Co. Litt.* 303. It would have been impoſſible to ſtate the bounds more particularly, in a country, at that time probably filled with hoſtile tribes of Indians. It is enough to give a general deſcription of the place, and it is the buſineſs of the ſurveyor to aſcertain the lines with preciſion; which is proved by the remark, that it is made his duty, by the act, to ſee to the length and breadth. The meaning of the entry was that

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they ſhould begin at the confluence, and go up the forks, as far as Simpſons creek, for quantity; and that is the uſual courſe in buſineſs of this kind. It was not neceſſary to ſay in the entry that they were to go acroſs from the mouth of Simpſons creek to Tyger valley river; for that was implied; and if the entry had ſaid ſo expreſsly, a future locator would have been no wiſer, than without it. The entry therefore was preciſe enough; and of courſe the objection upon that ground, will not avail the appellee.

The length of time does not forfeit the entry, as no notice to ſurvey was given. The act of 1785 altered that of 1784, as to the time; and if Banks failed to appoint an agent, as that act required, it was matter of evidence, and ought to have been ſhewn in the finding; but, as it is not, the court would, if neceſſary, preſume that it was done. But this is unneceſſary to be contended for; becauſe the continuing acts of '88, '90, '91, '92, '94, '95, and '96 do completely ſave the entry; for their proviſions are general; and contain no exceptions with regard to the appointment of agents. Conſequently they extend to this, as well as to any other caſe. It is impoſſible, in ſhort, to take the caſe out of the operation of thoſe laws; for the declaration is ſo general that no exception can be made.

The ſeparate ſurveys are allowable; for they do no prejudice: and the warrant itſelf expreſſes one or more ſurveys; which looks as if the legiſlature contemplated caſes of this kind, as there would often be a neceſſity to make them: So that although there is no expreſs declaration that ſeparate ſurveys on the ſame entry may be made, yet it is fairly to be collected from the general complexion of the law, and from the reaſon of the thing.

Cur adv. vult.

April Term 1803.

Currie *vs.* Martin.

The case was this Term argued again by Williams, Call, Randolph and Wickham for the appellants; and Warden and Doddridge for the appellees.

LYONS Judge—Afterwards delivered the resolution of the Court— That Martin the appellee shewed no title to the warrant under which the survey was made, as it did not appear that it had ever been assigned to him; and therefore that the judgment of the District Court was to be reversed, and the caveat dismissed with costs.

RUSSEL *Against* CLAYTON.

If a clerk of a court issues a writ of *scire facias* for too little, and the plaintiff obtains judgment & issues execution for the sum in the *scire facias*, he shall recover against the clerk in a subsequent action the difference between the true sum for which the *scire facias* ought to have issued, and that for which it did issue: Nor will it make any difference whether the special verdict finds special damage sustained by the plaintiff or not

THIS was an action on the case brought by Clayton a gainst Russel, clerk of the Williamsburg District Court, for a mistake in issuing a writ of *scire facias;* and the jury found a special verdict, which stated, That the plaintiff on the 7th of May 1790 obtained a judgment in the District Court against Thomas Hubbard, Administrator, with the will annexed of James Hubbard for £313 and one penny damages, to be discharged by the payment of £156: 10 with 5 per cent. interest from the 19th of July 1773 and the costs, to wit, 3. 6. 170lbs. tobacco and 186lbs. tobacco. That on the 13th of November 1792, the plaintiff sued out a writ of *scire facias* to revive the judgment against the said Thomas Hubbard, administrator as aforesaid. That the said writ of *scire facias* was made out by the said Russel, who, by mistake, inserted that the judgment was to be discharged by the payment of £56: 10, with interest from the 19 July 1773, and costs, instead of 156: 10 with interest from the 19 July 1773 as it ought to have been. That the said writ was returned executed. That the plaintiff appeared by his counsel and judgment was rendered for the said £313 to be dis-

Ruſſel vs Clayton.

charged by the payment of £ 56: 10 and the coſts. That an execution iſſued on the latter judgment, which was replevied. That the plaintiff never made any attempt to have the error amended. That there was no other evidence in the cauſe except the facts above ſtated.

The Diſtrict Court gave judgment for the plaintiff; and Ruſſel appealed to this Court.

Counſel for the appellant. The writ appears to have been delivered to the plaintiff; who ought to have inſpected the ſum, and ſeen that it was right. He might have corrected the miſtake, by diſcontinuing his writ, and bringing a new one, or by ſuing out a writ of error to the judgment, or even by moving to amend the proceedings without the form of a writ of error,—*Gordon* vs. *Fraſer*. 2 *Waſh*. 130; but having neglected to do ſo, he ought not to be allowed to charge the clerk for an accidental miſtake. Beſides it is found that there was no other evidence than that ſtated in the verdict; and as ſpecial damage is the git of the action, and none is ſhewn, it follows that the ſuit was not maintainable.—1 *Ventr*. 310.—2 *Wils*. 325. 4 *Burr*. 2060.

Counſel for the appellee. Whoever takes a beneficial office, takes it ſubject to all its inconveniencies, and is bound for the regular and proper tranſactions of all the duties belonging to it: therefore any improper act, whether proceeding from miſtake, negligence, or deſign, equally renders him liable to the party injured by it. Of courſe it being the duty of the clerk to iſſue the writ rightly, if he has done it wrong, he is reſponſible. Beſides the plaintiff was not bound to correct the error, and, perhaps it was prudent in him not to do ſo: becauſe that might have releaſed the clerk, and, before he could have obtained another judgment againſt the executor, the eſtate might have become inſolvent.

The damage done the plaintiff neceſſarily appears on the proceedings. It is the difference between the true ſum and that for which the writ erroneouſly iſſued. If this error had not been committed, it is probable that the plaintiff might have made his whole debt; becauſe it appears that the ſum for which the judgment was obtained in th *ſcire facias*, was actually made; and therefore the preſumption is that the whole might have been.

Cur adv. vult.

Per Cur: Affirm the judgment.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
OCTOBER TERM OF THE YEAR 1801.

BULLOCK & CLOUHG,

againſt

GOODALL.

If the ſheriff neglects to return an execution, at the requeſt of the pl'tff, he is not liable to a fine.

Quer: How far a court ought to go in impoſing a fine upon a ſheriff for not returning an execution?

Exceſſive fine is unconſtitutional.

Quer: Whether a depoſition taken after a cauſe is decided, but during the ſame term, can be brought in before the end of the term, and made part of the record?

GOODALL and Clough filed a bill of injunction in the high Court of Chancery againſt John Bullock jun. which ſtated that Goodall being ſheriff of Hanover in May 1792, a writ of *fieri facias* for £ 497 1 11¾ with intereſt from 21 December 1791 iſſued from the County Court at the ſuit of Bullock, againſt the eſtate of John Bullock the elder; which was delivered to Clough his deputy, who by virtue thereof took all the effects of the ſaid John Bullock the elder, and that the defendant told the plaintiff that his father had no other property. That the defendant bought the ſame at three ſo urths of the appr aiſed value, and deſired the plaintiff not to return the execution till he and the plaintiff ſhould come to a further ſettlement. That in May 1795, the defendant moved for and obtained a judgment for £ 264 8 9, with coſts, againſt the plaintiff Goodall, as a fine for not returning the execution, although the plaintiff offered to prove the circumſtances aforeſaid, the court

being of opinion that no notice ought to be taken of them in a court of law. The bill therefore prays for an injunction.

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The anſwer "admits the execution, and that the defendant purchaſed the property. Denies that the defendant told the plaintiff that his father had no other property on which the execution could at any after time be levied, although he might have told him that *there was no other property just then to be come at.* Denies that he requeſted the plaintiff to retain the execution; on the contrary he requeſted it to be returned, and Clough promiſed, but failed to do it. Does not conceive the plaintiffs defence better in equity than at law, and prays the judgment of the Court whether there be any equity ſuggeſted in the bill which can give juriſdiction to this Court. Does not admit that there is no other property on which the execution can be levied." A witneſs ſays that the defendant told him at the ſale, that *the woole of his father's property was sold for his benefit.* Another witneſs ſays, that Clough withdrew the execution on the trial of the motion after producing it, and was told by the Court if he did not return it they would fine him five per cent, inſtead of two and a half; and that he has frequently heard the defendant ſay he ſhould be obliged to move for a fine for not returning the execution, as he could not get Clough to do it. A third witneſs ſays that he heard the defendant aſk Clough if he had returned the execution, and on being told that he had not, he then ſaid, for *God's sake return it immediately.* A fourth witneſs ſays, "that he heard the defendant ſay he wiſhed Clough would not return the execution until a ſettlement took place between them. That on Clough's aſking the defendant if there was nothing of his father's eſtate now to be got with that execution, he anſwered not that he knew of; and being aſked if he wiſhed the execution to be returned, he anſwered it was immaterial, and that Clough might do it when convenient,

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for he never expected to get any thing more from his estate.

The Court of Chancery, on the 12th of May 1798, perpetuated the injunction with costs; and Bullock appealed to this court.

On the 24th of May 1798, the plaintiff took the deposition of Thomas Moore, who says that the defendant requested him to tell Clough not to return the execution until he had settled; and that the deponent informed Clough thereof.

On the 26th of May 1798, the Court of Chancery made an order purporting, that Moore's deposition was that day brought in by the plaintiffs counsel, and on his motion was received by the Court, and ordered to be made part of the record.

CALL for the appellant. The whole case made in the Court of Chancery was certainly proper for a court of law; and therefore the plaintiffs should have defended themselves there and not resorted to the Court of Equity. The jurisdiction is sufficiently excepted to in the answer; for if an exception can be collected from the pleadings, it is all that is requisite: And therefore in *Pryor* vs. *Adams*, 1 *Call's rep.* a demurrer was held to be a sufficient exception, although the act of 1787 mentions plea. An analogous principle on the law side was supported by the Court in *Garlington* vs. *Clutton*, 1 *Call's rep.* where the matter relied on was very informally stated; but the Court said it was sufficient, if the exception appeared at all; and as it was apparent that it was relied on, that was enough. Therefore the bill ought to have been dismissed, upon the ground of the want of jurisdiction.

But upon the merits the case is in favor of the appellant. For there is only one witness to prove that the return was suspended by the consent of

the appellant; and the anſwer in effect denies it. Therefore without circumſtances the anſwer muſt prevail. But there are no circumſtances; and conſequently the uſual rule muſt take place. Beſides it was the duty of the ſheriff to return the writ, and if he failed to do ſo, it was at his own peril. Of courſe he cannot complain of a judgment which was rendered in conſequence of his voluntary delinquency.

DUVAL and WARDEN *contra*. The County Court exerciſed their diſcretion improperly: and therefore the Court of Chancery did right in granting relief: Eſpecially as many facts appeared before that court, which did not appear in the County Court; ſo that it was a different caſe in equity from what it was at law. Beſides, if it had been the ſame caſe, and the evidence was not ſtated on the record ſo that a court of error could decide on it, this neglect of their attorney ought not to prejudice the plaintiffs; but they ought to have relief in equity. The conduct of the appellant was unconſcientious in proceeding to aſk a fine after he had conſented that the return ſhould be delayed. But the fine was exceſſive, and much beyond any proportion to the offence. For the fine is only intended as a compenſation for the injury, which the plaintiff in the execution has ſuſtained by being kept out of his money, and the proper meaſure for that is intereſt. But here the fine is much greater than any rate of that kind. Beſides, in this caſe, the defendant in the execution was inſolvent, and therefore the appellant loſt nothing by the delay. The Court of Chancery had juriſdiction. For the bill alledges that the execution was held up with the appellants conſent, and he is required to anſwer that charge; which gave juriſdiction, as that fact could not be ſhewn at law. But be that as it may, the juriſdiction is not properly excepted to; for the anſwer does not deny it in expreſs words, or in any equivalent terms.

Bullocft, vs. Goodall.

CALL in reply. If the fine is levere, it is the law which is to blame; becauſe it is according to the directions of the act, which is a remedial ſtatute; and therefore to be ſo conſtrued as to advance the remedy and ſuppreſs the miſchief. The fine is not intended as a mere compenſation, but as a puniſhment for the delinquency of the ſheriffs, who could not be controuled by the former laws. The conduct of the deputy was irreverent to the County Court, in withdrawing the execution after he was warned againſt it: A circumſtance which aggravated the caſe, and deſtroys all claim to favour. Added to which he was ſeveral times requeſted by the appellant to return it. It does not abſolutely appear that old Bullock was inſolvent, for it ſeems there was ſome expectation of other property. But if he had been, that circumſtance will make no difference; as the law does not diſcriminate between ſolvent and inſolvent defendants.

PENDLETON Preſident, delivered the reſolution of the Court as follows: In May 1792, An execution, for the appellant againſt the eſtate of his father, was iſſued from the County Court of Hanover, returnable to Auguſt court following, anb was put into the hands of Clough the deputy of Goodall the ſheriff, to be executed. He levied it on all the eſtate of the father which could be found, and ſold it at auction, when the appellant the creditor became the purchaſer of the whole for £ 206 3 6, for which he endorſed a receipt upon the execution, dated the 22d of May. In May 1795, Bullock upon notice to Goodall, obtained a judgment againſt him in Hanover court for a fine of £ 264 8 9 for Clough's not having returned the execution. In June Goodall obtained judgment againſt Clough for the amount of the fine and coſts. But Goodall and Clough unite in a bill, exhibited to the High Court of Chancery, praying an injunction to, and relief againſt Bullock's judgment, on this ground, that the execution was retained, at the requeſt of Bullock, until a ſettle-

ment ſhould take place between him and Clough.

Bullock, *vs.* Goodall.

The anſwer denies the requeſt, not indeed in the terms of the charge, but probably comprehending a denial of them. Several depoſitions are taken fully proving the confeſſion of Bullock, and the general opinion that Bullock the father had no eſtate, on which a further execution could be levied. One witneſs, Thomſon, ſwears, that in Jan. or Feb. 1795, he applied to Bullock for his taxes &c. and for Clough's commiſſions for ſerving the execution: Bullock refuſed to ſettle with him, and deſired him to requeſt Clough to come and ſettle; and not to return the execution till the ſettlement. He delivered the meſſage, and a ſettlement took place, when being aſked if the execution muſt then be returned, Bullock ſaid that it was immaterial, and that it might be done when convenient. A ſecond witneſs, Moore, confirms the fact of the requeſt not to return the execution until a ſettlement; but as his depoſition was taken after the decree, and the conſent of parties does not appear, the court doubt the propriety of conſidering it as evidence; and therefore it is not regarded. The anſwer then ſtands contradicted by one poſitive witneſs only; but the court conſider that witneſs as ſupported by the ſtrong circumſtances, of Bullock's having reſted from 1792 to 1795, without complaint of its not being returned; of having no inducement to require its return, nor the ſheriff any to retain it; ſince the money levied was paid, and no property for a new execution to act on; and therefore the anſwer is to prevail within the rule of this court. The latitude in the ſum of the fine, left to the diſcretion of the court, is meant to meet the degrees of offence in the officer, & of injury to the creditor. That diſcretion is not to be exerciſed arbitrarily, but juſtly; ſo as to impoſe a fine commenſurate to the offence and injury; and it was to check theſe diſcretionary powers, that our bill of rights has declared that "exceſſive fines ſhall not be impoſed." No man can doubt, but

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that a fine of £ 264 8 9, impoſed on an officer who has committed no fault, for the benefit of a creditor who has ſuſtained no injury, is ſuperlatively exceſſive. unconſtitutional, oppreſſive, and againſt conſcience. As little can it be doubted, that a court of equity may, and ought to give relief, even, if the appellant had pleaded to the juriſdiction, or demurred, as was done in the caſe of *Pryor* vs *Adams*, 1 *Call*. The decree affording this relief is therefore unanimouſly affirmed.

BRADLEY *againſt* MOSBY, *and* WALTON *againſt* MOSBY.

Limitation, by deed, of ſlaves to the donors daughter for life, & after her death to the heirs of her body, to the only proper uſe & behoof of ſuch heirs, their ex'ors, adm'rs or aſſigns. *Quer*: What eſtate the daughter takes?

MOSBY brought detinue againſt Bradley for ſome ſlaves. Plea *non detinet*, and iſſue. The jury found a ſpecial verdict. Which ſtated that on the 27th of March 1758, Thomas Walton conveyed the uſe of a negro woman by the name of Lucy to his daughter Patty Moſby, wife of Edward Moſby, by a deed the material parts of which are as follows. The donor, in conſideration of the natural love and affection which he bears unto the perſons therein after named, and for other cauſes, gives to his daughter Patty wife of Edward Moſby, "*the uſe of two negro ſlaves*, "*during her natural life*, viz. a boy named Abram "and a girl named Lucy. To have &c. the ſaid "ſlaves unto the ſaid Patty *to the only uſe and* "*behoof of the ſaid Patty during her natural life*, "and after her death, I give and grant the ſaid "ſlaves with their increaſe, *to the heirs of her bo-* "*dy*, *to the only proper uſe and behoof of ſuch* "*heirs*, *their executors*, *adminiſtrators or aſſigns*; "and in caſe my ſaid daughter Patty *ſhould die* "*without heir of her body*, in that caſe, I give and

"grant the said slaves with their increase to my "son Robert Walton, his executors, administra- "tors or assigns, to the only proper use and be- "hoof of him the said Robert Walton, his execu- "tors, administrators or assigns; I the said Tho- "mas Walton all and singular the aforesaid slaves "to my *said daughter Patty the heirs of her body*, "or my said son Robert, or to either of them in "manner and form as above is particularly speci- "fied as the case may happen, shall and will war- "rant and forever defend." That the said Edward Mosby was possessed of the said Lucy under the said deed, from the date thereof to the time of his death. That he died intestate, and, on the division of his estate, the said Lucy was allotted to the said Patty, wife of the said Edward, as her dower, under a decree of Cumberland Court, and that the said Patty retained possession of her during her life. That she died in 1794; and that the said Lucy is the slave in the declaration mentioned, and that the slave Charles is her son born after the said allotment of dower. That the plaintiff is the eldest son of the said Edward Mosby; and that the administrator of the said Edward hath, since the institution of this suit, given his assent thereto, by a certificate to the Court, that the debts are all paid, and that he has no objection to the suit brought by the plaintiff. That the defendant married one of the daughters of the said Edward Mosby and Patty his wife, and together with the rest of the children of the said Edward and Patty, divided the said Lucy and her children (eight in number) among all the children of the said Patty. That this division was made without the consent of the plaintiff; but an equal childs part was allotted him, which he took possession of, and has retained it ever since. That the defendant is in possession of the slaves in the declaration mentioned.

The District Court gave judgment for the plaintiff; and Bradley appealed to this Court.

Bradley vs Mosby.

RANDOLPH for the appellant. The intention of the Donor was clearly to give an eſtate for life only; and his intention ought to be regarded. There is no analogy between this caſe and that of a diſpoſition of lands; for this is a diſpoſition of chattels merely; and none of the rules with regard to lands apply to the caſe. For they depended upon principles drawn from the feudal ſyſtem; and the reaſons having ceaſed the rules will ceaſe likewiſe. The doctrine, upon the ſubject now before the Court, is all ſummed up in *Fearne* 363; which demonſtrates that mere perſonal eſtate is not ſubject to the rule of real eſtates. The gift here is to the daughter for life, and then to her heirs, their executors and adminiſtrators: Which latter words, clearly turn the word *heirs* into a word of purchaſe, *Hodgson* vs *Bussy* 2 *Atk.* 88. Beſides he gives only the uſe to the daughter; which ſhews he did not mean the whole property ſhould paſs to her.—The eldeſt ſon only can be entitled under the limitation to the *heirs*; but that word is to be conſtrued according to the intent, *Fearne* 478. 3. *Wms:* 260. The word itſelf is ſynonymous to children; and Patty the daughter died in 1794; when all the children were heirs, and therefore entitled.

WICKHAM *contra.* The deciſions have ſo fixed the rule, that it can only be repealed by the Legiſlature. It will not follow that becauſe the reaſon has ceaſed the rule will ceaſe alſo, as is very ably ſhewn by Fearne in his treatiſe on remainders. Perſonal property ought not, and cannot be entailed *Beauclerk* vs *Dormer* 1. *Vez.* 133 4. 4 *Bac. Abr:* 320 *(new edition.) Daw.* vs *Pitt. Fearne* 347. 2. *Bro. cb* 33. Intention, only, is not ſufficient, without expreſſion. There muſt be ſome word of reſtriction. The words executors and adminiſtrators are not ſufficient; and the caſe of *Hodgson* vs *Bussy*, 2 *Atk.* 88, had additional grounds.

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The plaintiff was entitled as heir. The word *heirs* does not include all the children, but only him who would have been heir at the time. For it was *descriptio personæ*, and as soon as a son capable of taking was born, the limitation vested in him as a remainder; and was no longer liable to contingency, or alteration.

This was a disposition by a common law conveyance. But, at common law, a gift to A. for life of a personalty transfered the whole interest; and although that rule has received an alteration in the case of executory devises and trusts of terms, *Fearne* 298. 354, yet it has never relaxed in a mere common law conveyance of a personal chattel. For the same principles do not apply; and therefore the first disposition to the daughter included the whole interest.

The plaintiff cannot be said to have acquiesced in the division. For the slaves were held by the mother, in right of dower; and, after her death, the allotment was without his consent. Nor does his taking part, and suing for the rest, prove his assent; for the verdict finds that it was against his inclination.

RANDOLPH in reply. Limitations of this kind are good; and a contrary decision would overturn many titles. The act of 1727 says they shall pass as chattels; and *Higginbotham* vs *Rucker*, 1 *Call*, is an express authority in our favour. The whole doctrine is reviewed in *Dunn* vs *Bray*, 1 *Calls rep.* 338; which case shews that the Court, in every instance of this kind, leans to a restriction in order to support the intention. The testator by the word *heirs* meant the same as *distributees*; and the children living at the time of her death were the persons intended *Fearne* 509. If a man gives a chattle to one for life and says nothing of the remainder, it reverts; and therefore the doctrine contended for, relative to the common law con-

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veyance, cannot be maintained; becauſe the deed conveyed this reverſion.

WICKHAM. In *Higginbotham* vs *Rucker*, the point relative to the common law conveyance was not made; and therefore that caſe is no authority.

Cur adv. vult.

ROANE Judge. This is an action of detinue for ſlaves, brought by the appellee againſt the appellant, and the queſtion of his title ariſes under a deed of gift by Thomas Walton, of the 27th of March 1758, which is ſtated at large in the ſpecial verdict.

Before I go particularly into the conſtruction of that deed, I will give my ideas as to a preliminary point which was made, and ſtate ſome general principles which I think muſt govern in the deciſion of this caſe.

It was in the firſt place objected that a limitation of ſlaves by way of remainder after an eſtate for life was not good by *deed*. The anſwer to this is that our act of Aſſembly has put ſlaves in this reſpect on the ſame footing with chattels perſonal by the common law; and, without refering to other authorities, Judge Blackſtone in ſtating the modern doctrines on this ſubject as relative to chattels perſonal, has a paſſage to this effect. "Formerly "there could be no remainder of a chattel perſo-"nal by the rules of the common law; but it is "now otherwiſe: And therefore if a man by deed "or will limits his books or furniture to A for life, "remainder to B it is good." 2 *Black. com.* 398.

Conſidering this broad objection then as entirely out of our way, I will ſtate it as a general rule, that whatever words would in the diſpoſition of real eſtate give an expreſs eſtate tail, or ſuch eſ-

tate by implication, will, in the disposition of a chattel real or personalty, carry the whole interest, with an exception however if from any expression it appears that the heirs or issue were intended to take as purchasers. This rule is laid down in 2. *Fonbl.* 81: and is supported by the authorities there cited, as far as I have made myself acquainted with them.

Whether that general rule or its exception will govern the present case, I shall presently enquire.

It has been objected that the exception from this rule, arising from intention, has been confined to marriage settlements or wills only. But this objection is overruled by Lord Harwicke in *Hodgson* vs *Bussey*, 2 *Atk.* 92. He states the case of *Lisle* & *Gray* as a full answer to that objection and says, "it is not the consideration of its being a convey-"ance on marriage or on any other account; but "the intention of the parties appearing on the "deed that always governs the court in construc-"tions;" and according to this principle a decision was made on a voluntary deed in the principal case.

That case it is true, was the case of a term for years; but I know of no principle or authority, which, in this respect, distinguishes chattels personal therefrom. Indeed in the case of *Beauclerk* vs. *Dormer*, it is said, by the same Chancellor, that it would be of mischievous consequence, and produce confusion, if the court should admit of a distinction between chattels real and chattels personal; 2 *Atk.* 314.

Nor can any difficulty arise in the application of any case I may cite in this cause, from the consideration that such cases are by way of trust; for it is clearly held in *Garth* vs. *Baldwin* 2 *Vez.* 655.— "That in limitations of a trust of either real or "personal estate to be determined in this court,

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" (the Chancery) the construction ought to be " made according to the construction of the le- " gal estate."

Bearing these principles in mind, I will state the substance of the deed before referred and the questions arising thereupon.

The deed is as follows: The donor, in consideration of the natural love and affection which he bears unto the persons therein named, and for other causes, gives to his daughter Patty wife of Edward Mosby, " *the use of two negro slaves, dur-* " *ing her natural life*, viz. a boy named Abram, " and a girl named Lucy. To have &c, the said " slaves unto the said Patty *to the only use and be-* " *hoof of the said Patty during her natural life*, " and after her death, I give and grant the said " slaves with their increase, *to the heirs of her bo-* " *dy, to the only proper use and behoof of such* " *heirs, their executors, administrators or assigns*; " and in case my said daughter Patty *should die* " *without heir of her body*, in that case I give and " grant the said slaves with their increase to my " son Robert Walton, his executors, administra- " tors or assigns, to the only proper use and be- " hoof of him the said Robert Walton, his execu- " tors, administrators or assigns; I the said Tho- " mas Walton all and singular the aforesaid slaves " to my *said daughter Patty the heirs of her body*, " or my said son Robert, or to either of them in " manner and form as above is particularly speci- " fied as the case may happen, shall and will war- " rant and for ever defend." Upon this deed and the finding of the jury, that the appellee Hezekiah Mosby is the eldest son and heir at law of his father Edward Mosby (by the grantee Patty,) it is to be decided whether the absolute title of the original slave Lucy vested in the said Patty? Or whether the remainder (after her death) was vested in the said Hezekiah, when he should be born? In other words, whether the general rule or the

exception before ſtated ſhall prevail? Or whether the words "heirs of her body" in the ſaid deed ſhall be conſtrued to be words of limitation or of purchaſe?

I ſhould be unwilling to embark, without the aid of precedents, into the vague and extenſive field of intention, eſpecially in a deed; but if principles of deciſion applicable to this caſe have grown into a rule of property, then that reluctance and the danger on which it is founded will conſequently ceaſe.

I conſider that not only principles of deciſion are to be found in many caſes to ſupport my opinion, that theſe words are words of purchaſe in the preſent inſtance, but that the caſe of *Hodgson* vs. *Bussey*, 2 *Atk.* 89, is ſubſtantially a direct authority.

That caſe was a conveyance in truſt of a term, to permit the wife to receive the rents during the term, *if she should so long live*; and afterwards to the huſband, *if he so long live*; and after his death in truſt for the heirs of the wife, by the huſband begotten, "*their heirs, executors, administrators and assigns.*" The Chancellor conſtrued the words *heirs of the body*, to be words of purchaſe; and ſaid that the general run of caſes makes this plain, that notwithſtanding they ſeem to ſound like words of limitation, yet upon circumſtances and the intention of parties, they may be conſtrued words of purchaſe, and deſcriptive of the perſon who is to take; and further that words of limitation are not properly uſed in terms for years.

It is true in the principal caſe, the Chancellor ſeems to lay ſtreſs upon the words, *if she so long live*, as being tantamount to the words *for life only*; and does not decide it expreſsly and excluſively upon the words *executors, administrators and assigns.* But in *Theebridge* vs *Kilburne*, 2 *Vez.* 234

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the same Chancellor says "The governing reason "in *Hodgson* vs. *Bussey* was, that the limitation "was to the heirs of the body, their *executors ad-* "*ministrators or assigns*, which words differed it "from *Stanley* vs *Lee*,— and made that a plain "case: because there was no *eye of an entail* (as "Hale said) for it could not go from one heir of "the body and his executors and administrators, "to another and his executors and administrators; "and therefore must vest in the first person taking "and his executors and administrators, in the same "manner as if it had been said I give it after both "of their deceases in trust for the eldest son begot- "ten, but if none, then to a daughter their execu- "tors administrators and assigns."

So again in *Garth* vs. *Baldwin*, the same Chancellor says "In *Hodgson* vs. *Bussey* I held adding the words *executors administrators and assigns* strong evidence of intent to give only a usufruct interest for life, and to vest the property in the heirs of the body."

These are explained to be the grounds of the decision in *Hodgson* vs *Bussey*; and they appear to me to be very strong and applicable to the case before us, which has the same expression, such heirs their *executors, administrators and assigns.*

I should lay no stress on the circumstance of the use of the negro being given to the daughter, standing singly. For, if thereupon was ingrafted a naked limitation to the heirs, the whole property would be vested in her, as much as if the negro itself had been given. This is abundantly proved by the case of *Daw* vs. *Pitt*; there being no distinction between giving the use, profits or interest of money or goods, and giving the thing itself. But perhaps, under the spirit of the foregoing decision, it may be resorted to; in this case as auxiliary to other circumstances, to shew that not the

property, but the uſufruct thereof was given to the daughter. I ſay, perhaps; for I have formed no final opinion on this point; nor is it the principal one on which my opinion is founded. Walton vs Moſby.

This is my opinion on the principal queſtion: And it remains now to be decided whether the eldeſt ſon (the appellee) who at the time of his birth, and then came under the deſcription in the deed, or all the children who at the time of the death of the daughter, fulfilled ſuch deſcription (being then the heirs of her body) are entitled? And I conſider the ſame caſe of *Theebridge* vs *Kilburne* as a direct authority in favour of the eldeſt ſon. In that caſe it was ſaid, in ſubſtance, that if there had been ſufficient ground to conſtrue the words to be words of purchaſe, it would veſt in the iſſue as ſoon as born; and in thoſe caſes where the words *heirs of the body* have been conſtrued to mean iſſue, as words of purchaſe, it is never neceſſary that ſuch iſſue ſhould ſurvive the firſt taker, ſo as to be in ſtrictneſs *heir*; and that there was great reaſon for it; for if a daughter had been born and married, there was no reaſon why ſhe ſhould not be advanced by this in the life of her mother, unleſs there had been ſomething to reſtrain it to *heirs* of the body at the time of the death.

This ſame doctrine is alſo, I think to be found, in the before mentioned caſe of *Hodgson* vs *Bussey*.

I am therefore of opinion that the appellee had at the time of his birth a veſted remainder in theſe ſlaves: That it is not incumbent on him to ſhew himſelf to have been heir of the body of Patty *at the time of her death*; and that conſequently he is entitled to recover.

I have ſaid nothing in this caſe (as being unneceſſary however plain) upon the ultimate re-

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mainder to Robert Walton. There is one view however in which it is material to be considered, as fortifying the construction I have given the deed.

The deed states as a consideration, the *natural love and affection, he bore to the persons after named*, of whom Robert Walton was one. He was also an object of the donees bounty. In a case of doubtful construction then, that sense shall be prefered, which will reserve to him some interest. That can only be, by construing the words to be words of purchase; in which event, if no issue had been born, he would have been entitled: Whereas by construing them to be words of limitation, the whole interest would vest in the daughter, and he would be in every event excluded.

I am for affirming the judgment of the District Court.

LYONS Judge. Although it be a rule that in the construction of writings, the intention of the parties ought to prevail, yet that rule does not extend so far as to overturn the established interpretation which has, for ages, been put upon certain expressions; the legal effect of which, in particular instruments, has been constantly held to convey the absolute property. In the present case, the gift is to the use of the daughter for life, and after her death, to the heirs of her body, their executors, administrators and assigns; and in case, she died without heir of her body, remainder over. These words would have given an estate tail to the daughter in lands, and therefore they gave the absolute property in slaves. 2 *Fonb.* 81. 2 *Fearne* 363. I say they would have created an estate tail in lands; because it is a rule, that wherever the ancestor takes an estate for life, with a limitation, in the same instrument, to the heir, the heir takes by descent, and not by purchase. 1 *Co.* 104.—2 *Lev.* 60. *Raym.* 234. 2 *Black.* 332; and this whe-

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ther the eſtate conveyed be a truſt or legal eſtate. *Raym.* 330. 2 *Fonbl.* 395. 2 *Fonbl.* 82, 50. 1 *Ventr.* 373. The reaſon of which is very well explained by Judge Blackſtone, in his argument in the caſe of *Perrin* vs *Blake;* where, after remarking upon the objects of the rule, he proceeds to ſhew that it is, in effect, but the common limitation of an eſtate of inheritance. His words are, "the whole "of this rule amounts to no more than what hap- "pens every day in the creation of an eſtate in fee "or in tail, by a gift to A. and to his heirs for e- "ver, or to A and to the heirs of his body begotten. "The firſt words *(to A.)* create an eſtate for life. "The latter *(to his heirs* or *the heirs of his body)* "create a remainder in fee, or in tail; which the "law, to prevent an abeyance, refers to, and "veſts in the anceſtor himſelf, who is thus tenant "for life, with an immediate remainder in fee or "in tail: And then, by the conjunction of the "two eſtates or the merger of the leſs in the great- "er, he becomes tenant in fee or tenant in tail in "poſſeſſion." *Harg. law tracts* 500. This then being the clear reſult in law of ſuch limitations, it cannot be departed from in the conſtruction of a deed, which does not admit of the ſame latitude as wills. 2 *Blacks. rep.* 1085. 1 *Vez.* 151, 4. *Term. Rep.* 299. 2 *Bro. Ch. cas.* 233, 578. *Cro. Eliza.* 856. 2 *Vez.* 257. 5 *Atk.* 731. *Fearne*, 298. 2 *Fonbl.* 88. In all which caſes the diſtinction between wills and deeds will be found expreſsly marked; and that there is an indulgence, contrary to the rules of limitation in conveyances at common law, allowed to the former, which does not take place in the latter. The caſe of *Higginbotham* vs. *Rucker*, 2 *Call*, 313 is not like this; becauſe that was decided upon the particular expreſſions, which the court thought tied up the words, *die without iſſue*, to the lifetime of the daughter: But here was a limitation beſtowing to the whole intereſt, without any thing to reſtrain the legal operation of the words.

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The act of Assembly, passed in 1727, (*old edi*: *Laws* 81,) makes no difference, for the words "no remainder of any slave or slaves shall or "may be limited by any deed, or the last will and "testament in writing, of any person whatsoever, "otherwise than the remainder of a chattel per-"sonal, by the rules of the common law, can or "may be limited," should be taken according to the subject matter, that is to say, they ought not to be carried further than to mean, that when the limitation is by deed, it should be according to the rules of law, with respect to deeds; and when by will, to the rules of law with respect to wills. I consider the case, therefore, as standing upon the general rules established by law for the interpretation of deeds: And, taking that for the standard, the case, in effect, is no more than a gift to the daughter for life, with remainder, after her death, to the heirs of her body; which, in the case of personal property, conveys the whole interest. The declaration of the use does not affect the case; for such a declaration even in a will has not been allowed to controul the legal operation of the words, *Taylor* vs *Goodwyn*, 2 *Wash*; and much less ought it in a deed: Particularly in the present case, where the limitation of the use is so connected with that of the property, as to render it attendant on, and subject to precisely the same limitations, and measure of interest, as the property itself is.

I am therefore of opinion that the daughter took the absolute property; and that the judgment of the District Court ought to be affirmed.

PENDLETON President The deed of Thomas Walton, dated March 27th, 1758, conveys to his daughter Patty Mosby, wife of Edward, the use of two negroes Lucy and Abram, *during her natural life*, and then proceeds thus, *after* her death, I give and grant *the slaves* and their in-

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creaſe to the *heirs of her body*, to the uſe and behoof of *ſuch heirs*, their *executors*, *adminiſtrators or aſſigns;* and in caſe my ſaid daughter Patty ſhould die, *without heir of her body*, in that caſe I give and grant the *ſaid ſlaves* and their increaſe to my *ſon Robert* his executors adminiſtrators and aſſigns. The daughter Patty had then one child. Edward Moſby, poſſeſſed of the ſlaves died *intestate* in 1769, leaving iſſue by his wife Patty, who ſurvived him, Hezekiah the plaintiff, (who was the eldeſt ſon, and heir at law) the wives of the two defendants Walton and Bradley, and two other children. On a diviſion of Moſby's eſtate, Lucy was allotted to Patty *for her dower*, under a decree of Cumberland County Court, and was held by her, *as her part of the estate of Edward*, till her death in 1794; when Lucy with eight children were divided between the above mentioned five children of Patty; the ſlaves, in diſpute, being the parts allotted to the wives of the defendants reſpectively. This diviſion was made *without* the conſent of the plaintiff, but an equal ſhare was allotted him; which he took poſſeſſion of, and has kept ever ſince. The judgment in the Diſtrict Court is for the plaintiff.

If Patty took an eſtate for life, and the remainder to the heirs of her body be a legal one, and deſcriptive of *all her children*, then the law is for the defendants, and the judgment is to be reverſed. If on the contrary the limitation to the heirs of her body cannot take effect as a remainder, but enlarges her eſtate for life into an eſtate tail, then the property veſted in her; and of courſe in her huſband, who had poſſeſſion: Or if the remainder be a good one, but was deſcriptive of her eldeſt ſon as heir of her body, in either caſe the judgment in favour of the plaintiff is right.

An objection was made by the counſel that where executory deviſes of perſonals had been

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extended liberally in England, it was in consequence of the latitude allowed in the construction of wills, to favour the intention of testators; which latitude was not permitted in constructing deeds; and he seemed to doubt, whether an executory interest in personals, could be created by deed, in England. I am inclined to think that if any instance of such deeds occur there, they are rare, except in the case of marriage, or other family settlements; of which the books abound with instances, and we are told without contradiction that limitations of chattel interests in such settlements, and executory devises, stand on the same ground in construction. In this country deeds for slaves are common; and for this reason I presume that the legislature, in the act of 1727, have placed deeds and wills upon the same footing in respect to the limitations now under consideration; referring to the standard of the English adjudications in respect to executory devises and limitations in deeds of trust. It is to be lamented that the adjudications were not less fluctuating than they appear to have been, and that the liberal progress to favour men's intentions, which had taken place from Mathew Mannings case, till lately, should seem to be arrested by some late decisions, and an attempt made to carry us back to the old rigid law upon the subject. However I do not think this Court bound to follow them in their instability, and by that means to keep afloat the principles upon which this great branch of our property depends. Although the pride of perpetuating families by intails is justly reprobated by our new order of things, and never could with propriety be gratified in the disposition of chattels, yet to restrain parents from guarding against the experienced improvidence of a child, while he is making provision for its immediate subsistance, by restraining his power of squandering the property, and securing that property to pass to the descendants of that child, would be an extreme, inconvenient to individuals and to society, by

damping the ſpirit of induſtry. A medium between theſe two extremes is produced by the doctrine of executory deviſes and limitations in deeds of the ſame ſort; the principles of which permitting them when they are to take effect at the end of a life or lives in being, or a ſhort time after, & diſappointing all attempts to perpetuate perſonals in the family equally avoids both thoſe extremes. That a limitation in the caſe of chattels, creating an eſtate tail is void, has never been doubted; but the doctrine that there is a diſtinction between words, which create an expreſs intail, and ſuch as create an eſtate tail in lands by implication and conſtruction to favour the intention to provide for the iſſue, and that the latter ought not to be applied to the caſe of perſonals to deſtroy that intention, is founded upon ſound reaſoning; which, in my opinion, never has been, nor can be refuted. In the caſe *Lampley* vs *Brown*, 3 *Atk.* 398, there was a limitation of a term to A and to her iſſue, which Ld. Hardwick ſaid would veſt the whole term in A, if the deviſe had reſted there; but the addition of the ſubſequent words, *& if A die and leave no iſſue*, related to any child living at A's death, and ſhewed that ſuch was to take after A's death; and conſequently that the word iſſue there was to be conſidered as a word of purchaſe. In *Fearne* 384, it is ſaid a deviſe of a term to A for life, and afterwards to his iſſue, does not enlarge the eſtate to A, but after his death, the whole veſts in the iſſue.—*Fearne* 293, (after having conſidered the ſeveral caſes in which the rule of Lord Coke in Skelly's caſe had been adhered to, or departed from, which caſes, and their principles he ſtates to be of amphibious tendency, and to compriſe the production of a queſtion, the ſolution of which may, by profeſſional gentlemen, be truly termed the "*Hic labor*, the *Hoc Opus*," and to attempt it with preciſion is vain, until we can reduce all poſſible expreſſions, or indications of intention, to certain claſſes or degrees of relative force, affording a ſtandard

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ſcale, by which we might aſcertain what degrees of expreſs, or implicative indications of intention, were above, and what were below the controlling index of *Lork Coke's* rule) refers to Judge Blackſton's celebrated argument, in the caſe of *Perrin* vs. *Blake*, as the beſt guide in the ſolution of ſuch queſtions. That Judge ſtates four caſes, in which the rule does not apply, but *heirs of the body* are to be taken as words of purchaſe. 1ſt, Where no eſtate is given to the anceſtor. 2. Where no eſtate of inheritance is given to the heir. 3d, Where other explanatory words are ſubjoined to the former. 4th, Where a new *inheritance* is ingrafted on the heirs of the body; which is the preſent caſe. *Fearne* 299, gives the reaſon of this controul of the rule in a clear and ſenſible manner. If heirs of the body be words of limitation, changing the anceſtors eſtate for life into a fee tail, the eſtate muſt continue to paſs in ſucceſſion in tail, thro' all future deſcendants; which is inconſiſtent with the new ingrafted inheritance in fee ſimple, that reduces the words *heir* to deſignation of the perſon to take at the death of the tenant for life, and makes the perſon anſwering the deſcription, the *root* of a new *inheritance*, the ſtock of a new deſcent. There is no difference between *heirs* in the ſingle number, and *heirs;* ſince *one* and the *ſame* perſon takes in both inſtances, in the caſe of lands in England, the reaſon of which will be ſtated hereafter.

Upon theſe principles I proceed to examine the deed under *conſideration*. It gives the *uſe*, not the property, of the negroes to the daughter *for life*, ad after (or at) her death, gives that property to the *heirs of her body*, their executors, adminiſtrators or aſſigns. The remainder to his ſon Robert, in caſe the daughter ſhould die without heir of her body, ſeems unimportant, ſince the event did not happen, and it does not tend to alter the eſtates of the mother, or her children; but may conſiſt with both. There appears on the

face of this deed no attempt at a *perpetuity*; ſince, upon the determination of the eſtate for life, the property was to veſt, either in the children, if there were any, or, if none, in Robert. But, if in the old caſes, where the thing itſelf was deviſed for life with remainder over, it was conſtrued to be a deviſe of the property to the remainder man, and that the tenant for life ſhould have the uſe in the mean time; and if Lord Hardwick, in the caſe of Hodgſon againſt Buſſey, 2. Atk. 89, where a term was ſettled in truſt for one for life, and, after her deceaſe, in truſt for the *heirs of her body*, their executors, adminiſtrators and aſſigns, held that the limitation to the heirs of the body were words of purchaſe, and that the addition of the words, executors, adminiſtrators and aſſigns, was ſtrong evidence of the intent to give only an uſufructuary intereſt for life, and to veſt the property in the heirs of the body, ſurely this caſe is much ſtronger, where the uſe is expreſsly given for life, and the property firſt given to the heirs of the body, who are to be conſidered as the firſt takers, in whom the property is to veſt abſolutely, without any danger of a perpetuity. I have, therefore, no doubt, but that the remainder was a good one; and it only remains to conſider who is to take by purchaſe under it, whether the eldeſt ſon, as heir of the body? or all the children equally? It ſeems to me that, if this limitation were of land, the words "*heirs of the body*," taken as words of purchaſe, would carry the eſtate to the heir, or eldeſt ſon; but being of perſonals, in which the children were equally to ſhare (and I conſider the words *heirs of the body*, to mean children;) I am of opinion that they were all entitled to equal ſhares. In this I am alſo influenced by another conſideration, which would give the words the ſame effect in the caſe of lands. Heirs of the body, when taken as words of limitation, are collective, comprehending all future ſucceſſions of heirs; and therefore *heirs* in the plural refers to that ſucceſſion, and

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does not require more than one to take at the same time: But why, when the heirs of the body are to take by purchase, as designated, it should be confined to one child, when there are many, can only be accounted for from the influence of feudal principles, favourable to the rights of primogeniture, and the interest of the Barons to keep estates, as much as might be, in one hand. With the latter we happily have no concern: And since our system has abolished the preference of primogeniture, and called to succession all relations in the first and equal degree, our courts ought, in construction, to apply all the rules favourable to heirs in England, to the heirs as here described; and not to one, in exclusion of the rest. This will be the rule in cases happening since the revolution, and why not in those happening before, and decided on now? when it is to give words their natural meaning, as they are commonly understood, and not a technical sense, of which people at large, never heard. In *Higginbotham* vs *Rucker* the jury say, the donor by *heirs of the body* meant children; they were plain men interpreting the words of a *plain* man, in his donation, in the sense in which they are understood by all such men. To conclude I read this deed as I have no doubt it was intended, "I give to "my daughter the use of the negroes *during her* "*life* and *at* her death I give the property in them "to her children; and in case my said daughter "should die without a child (without heir of her "body in the singular number) I give the slaves to "my son Robert, as his property." So that, in all events the property was to vest, at the death of the wife, either in her children, if she left any, or if she left no child, then in the son Robert: This contingency therefore was not too remote, to admit of the limitation which gives a title to children, and the judgment to the contrary ought to be reversed.

In *Dunn* vs *Bray*, in this Court, the words of

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the will were, "I give and bequeath to my son Winter Bray 2 negroes, named, to him and his heirs forever, but in case my son Winter should die and leave no issue, then I give the said negroes to my son Charles and his heirs forever." Winter died without issue, and the limitation to Charles was adjudged good, as an executory devise; the words "*and leaving no issue*" confining the limitation to the time of his death. The case of *Higginbotham* vs *Rucker*, was a parol gift of slaves stated by the jury to have been a gift of slaves by the plaintiff to his daughter the wife of the defendant, *to her and the heirs of her body*, and in case she died *without issue*, (that is, children the jury say,) of her body then the negroes to return to the plaintiff. The wife died in less than a year, without issue; and this remainder was adjudged a good one; because the limitation to the father confined the dying without issue to happen in his life, and therefore was good within the rule. This case tends to confirm not only that rule but to obviate the distinction between a deed and will. I think therefore that the judgment should be reversed; but as two judges are for affirming it, that must be the judgment of the Court.

Judgment affirmed.

CROUGHTON, *against* DUVAL.

A security to a bond prior to the act of 1794, is not absolved from the obligation by requesting the obligee to sue, and his failure to do so

DUVAL filed a bill in the High Court of Chancery, stating, that he had become surety for Campbell in some bonds to Croughton. That the plaintiff had requested the defendant to sue Camp-

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bell, but never could prevail upon him to do ſo. That after Campbell's death the plaintiff ſolicited the defendant to take adminiſtration on his eſtate, and offered to be his ſecurity; but this alſo was declined. The bill therefore prays that the bonds may be delivered up. The anſwer denies any peremptory requeſt to ſue: but two witneſſes prove the requeſt; and one ſpeaks of the probable ability of Campbell to have paid, about that time. The Court of Chancery granted a perpetual injunction to any further proceedings on the ſaid bonds; and Croughton appealed to this Court.

WARDEN for the appellant. It is not proved that Campbell was inſolvent: Nor is it even fully eſtabliſhed that Duval requeſted Croughton to bring ſuit. But, if both had been ſhewn in the cleareſt manner, that would not have altered the caſe. The Chancellors principle is too broad; for it is not true that one man is bound to do for another, what the latter requeſts, although it might not prejudice the former. Duval might have paid the debt and taken an aſſignment of the bond, which would have enabled him to ſue Campbell, or he might have brought a Bill in Chancery, in nature of a *quia timet*, and prayed that Campbell might be decreed to pay the debt, and ſave him harmleſs. 1 *Ch. Rep.* 120. 1 *Ch. Cas.* 300, 223. 1 *Vern.* 190, *Fowl. Exch.* 38, 39. *Fonbl.* 38. But having neglected them all, he has no equity againſt the creditor. Croughton was not bound to adminiſter; he was not next of kin; and, if there was any advantage to have been derived from it, Duval might have taken the adminiſtration himſelf. The act of 1794 has no influence on the queſtion; becauſe it relates to future bonds only.

NICHOLAS, WICKHAM, CALL and RANDOLPH *contra*—The refuſal of Croughton to bring ſuit releaſed Duval from his obligation, as payment of the debt might then have been en-

forced. The anſwer does not deny the requeſt to ſue, and the depoſitions prove it. The indulgence under theſe circumſtances was unreaſonable; and changed the nature of the contract; *Nisbet* vs *Smith* 2 *Bro. ch. rep.* 581. *Rees* vs *Barrington*, 2 *Vez. jr.* 540, *Crompt. Chy.* 44. Civilians make a diſtinction between perfect and imperfect obligations; the firſt is where a man is not bound from any circumſtance to do a benefit to another, ſuch as to lend him money or other aid; but the ſecond is, where he is bound, from a prior conſideration, to perform ſome act in order to ſave the other from injury, or to retribute him for ſomething had, or ſome wrong ſuſtained. In the preſent caſe, the obligation to ſue was of the perfect kind; becauſe the circumſtances and relation of the parties required that indulgence ſhould not be given by one, to the injury of the other. But for another reaſon, the requeſt was proper; becauſe it prevented circuity of action: and, if Duval could have brought a bill of *quia timet*, there is the ſame reaſon for relief upon the requeſt; becauſe there is no magic, in the bill, to render that right upon the ſuit, which would not have been right without it. If the act of Aſſembly proves nothing for us, it has nothing againſt us; becauſe it only enacts what was equity before.

WARDEN in reply. The caſes cited on the other ſide have no influence on the cauſe. That of *Nisbet* vs *Smith* 2 *Bro.* was the caſe of an additional ſecurity taken by the creditor; and he had thereby contracted for a future day of payment, which put it out of his power to enforce ſatisfaction of the debt in the mean time. The ſame obſervation applies to that of *Rees* vs *Barrington*, 2 *Vez. jr.* and to the caſe from *Crompt.* Therefore no principle is to be drawn from thoſe caſes, which will affect the deciſion to be given in this. A mere delay to bring ſuit clearly does not exonerate the ſecurity; for generally ſpeaking

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a recovery can be had againſt the ſurety at any time when it can be obtained againſt the principal; and no caſe is ſhewn where a mere requeſt to ſue has been held to alter the law in this reſpect. Duval has no juſt cauſe of complaint; becauſe he might have paid the debt and purſued Campbell.

PENDLETON Preſident, Delivered the reſolution of the Court, as follows: This is an appeal from the decree of the Court of Chancery, where Mr. Duval exhibited his bill, ſtating that, on the 23 of April 1793, he, as ſecurity for Mr. Alexander Campbell, intered into three bonds to Mr. Craughton for £ 113 4 4d each; one payable in October 1793, another in January 1794, and the third in April 1794, all bearing intereſt from October 1790. That Mr. Campbell's circumſta[illegible]s being in a declining ſtate, Duval in October 1794, when all the bonds had become due, applied to Croughton, who well knew Campbells circumſtances, and requeſted him to bring ſuits on the bonds, which he declined doing, till after Mr. Campbell's death, inſolvent in 1796; his inducement for which forbearance was, Campbell's being his counſel in an important ſuit then depending, and his expectation that Campbell would be able to pay him from the fruits of a ſuit, then depending in this Court. That after Campbells death Duval again applied to Croughton to adminiſter on his eſtate, by which the debts might have been ſecured; but he refuſed to do ſo, and Duval not being a creditor, could not obtain ſuch adminiſtration. That in 1798, he received a letter, from the appellant Southcomb, intimating his claim to the bonds; which he anſwered, aſſigning reaſons againſt his liability. Croughton and Southcomb are made defendants, and required to anſwer the bill; and the prayer is, that the bonds may be cancelled ſo far as reſpects the plaintiffs, or that other relief may be afforded. The proofs fix the requeſt to ſue in 1794, but go no further. It is not proved that any new arrangements are made between the creditor and the principal, to obtain a forbearance of the ſuits; for, although it is ſtated that Campbell expected to

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pay from the effect of a ſuit depending, it does not appear that Croughton had *bound himſelf*, to wait till the event of that ſuit. It is therefore a naked caſe for the queſtion, whether a creditor by delaying to commence ſuit, when requeſted, by a ſurety without any thing done on his part, which may amount to a new contract with the principal, ſhall loſe his remedy againſt the ſurety? The queſtion is new, and indeed important; as there may perhaps be hundreds of bonds, dated prior to the act of 1794 exiſting in the ſtate, and probably not one of them in which the creditor has not forborne to ſue for a conſiderable time beyond the day of payment; which it is urged will amount to a diſcharge of the ſurety. It would indeed be much more important, if that act of 1794 had not ſettled the queſtion from that period. The act does not take away any remedy which the ſurety was entitled to before; and we come to conſider, what that remedy was? It is clear that the plaintiff might have paid the money, and proceeded to a ſuit himſelf, or if that was inconvenient, he might have brought his bill of *quia timet*, to have compelled the principal to pay, and the creditor to receive the money: But that the creditor ſhould loſe his debt, becauſe he was merely paſſive, in forbearing a ſuit which the ſurety requeſted him to bring, without any thing active between him and the principal, tending to ſhow a new contract for forbearance, is not, and the Court believe cannot be, proved by any of the caſes produced, or exiſting. In the caſe quoted from 2 *Brown*, 579, the creditor commenced ſuit, and upon the principal giving a note to confeſs judgment, agreed to ſtay execution for three years; which the Chancellor conſidered as a new contract, and compromiſe with the principal, without the conſent of the ſurety, and which deprived him of his remedy by the bill of *quia timet*; and therefore that the ſurety was diſcharged. In the caſe in 2 *Vez.* 540, the creditor took from the principal ſeveral notes and drafts, which were returned and new ones given, from time to time, which amounted to a new contract, and all this without conſulting the ſurety, who

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had this further equity in that caſe, that while, thoſe notes were tranſacting, conſidering himſelf as diſcharged he had paid over to the principal, more money than the amount of the debt, which had come to the ſureties hands, and the Chancellor adjudged that *that* ſurety was diſcharged. The circumſtances, diſcuſſed in thoſe caſes, ſo far from proving that the ſurety is diſcharged by a bare requeſt to ſue, not complied with, tend to eſtabliſh the contrary, that ſuch requeſt and a bare forbearance to ſue, does not amount to a diſcharge. Sureties are ſo far favored in equity, that the Court will never extend relief againſt them, further than, by their contract, they are bound at law; but fair creditors are alſo favorites in that court, and will not be deprived of their legal rights, without ſome fraud, or neglect in doing what they were bound to do. It was certainly unkind in Croughton, not to ſue when he was requeſted by the ſurety, which was ſo far a breach of his moral duty, but it was truly ſaid that this duty was ſuch as the Civilians deſcribe as an imperfect obligation, the performance of which was merely voluntary, and could not be enforced by a Court of Juſtice. Many inſtances of which were mentioned, and many more might have been added: The parties here had plain remedies. The creditor to ſue, if he choſe it; and, as he did not, Mr. Duval's remedy is before pointed out; which he neglecting to purſue, was, at leaſt, as much in fault as the creditor; and where equity is equal the law muſt prevail. The decree is therefore to be reverſed with coſts by the unanimous opinion of the Court, and in conſequence of Mr. Duval's conſent, entered in the record, he is decreed to pay the ſeveral ſums according to the bonds. The coſts in that court to be equally borne by the parties, as it ſeems to have been by conſent, to ſettle a new point.

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FLEMING *againſt* BOLLING,

EDWARD BOLLING, by his laſt will, after diſpoſing of ſundry lands and ſlaves among his four brothers, Robert, Thomas, John and Archibald, and after giving ſeveral other legacies, among which was one of £ 100 to his ſiſter Tazwell, deviſed as follows: "It is my will and deſire that my *Book* be given up to my brother Robert Bolling, *and that he receive all the debts due to me, and pay all that I owe.* The reſt of my eſtate negroes, horſes, clothes and every other part of my eſtate, not already given, I give to my brother Archibald for him and his heirs for ever." The teſtator died in Auguſt 1770; after whoſe death, the ſaid Robert Bolling, claiming the executorſhip under the above recited clauſe relative to the book, made *probat* of the will, and acted as executor until his death. The ſaid Robert Bolling died in 1775, leaving Fleming as his executor; againſt whom the ſaid Archibald Bolling brought this ſuit, for an account of the teſtators reſiduary eſtate.

By a deviſe of the reſidue the emblements growing on lands ſpecifically deviſed to another, will paſs.

The teſtator deviſes that his book ſhall be given up to A, and that he ſhall receive all the debts due, & pay all the teſtator owes; this is an appointment of A to perform the office of executor, but does not entitle him to the ſurplus of the debts due the teſtator, nor does it diſcharge him from a debt, which he owed himſelf.

The anſwer inſiſts that, by the deviſe relative to the book, the teſtator intended a gift to Robert of all his outſtanding debts; and hopes the defendant will be allowed to prove it. That Robert was entitled to a debt due from himſelf to the teſtator; and alſo to the emblements growing, at the teſtator's death, on the plantation deviſed to the ſaid Robert.

The Court of Chancery, being of opinion that the deviſe of the *book* was not intended as a beneficial bequeſt of the outſtanding debts to Robert; that his own debt was not extinguiſhed as the reſiduary claim manifeſted a different intention; that he was not entitled to the emblements growing on the lands deviſed him, which the act of Aſſembly had rendered aſſets; and that the ſurplus of all theſe ſubjects, after paying the teſtators debts and legacies, belonged to the plaintiff, decreed an account of the debts and

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emblements. From which decree Fleming appealed to this Court.

WARDEN for the appellant. The decree of the Court of Chancery is erroneous. For the emblements, ſtanding on the land at the teſtators death, belonged to Robert. This was clearly the rule at common law; and the act of Aſſembly makes them aſſets for payment of debts only. For the true meaning of the word *aſſets* is, a fund for payment of debts, *Terms de ley Tit. aſſets* page 63. 2 *Atk.* 206 *Cro. Eliz.* 61, 463. It is like the caſe of an eſtate *pur autre vie*, which, by the ſtatute 29 *Car.* 2, is made aſſets; and yet it has been held, that it was not diſtributable among the next of kin. 2 *Salk.* 464. 3 *Salk.* 137.

Upon the ſame principle then, as the act of Aſſembly in our caſe, merely declares that the crops ſhall be aſſets, they will be aſſets only for payment of debts, and will not be liable for payment of legacies, or ſubject to diſtribution.

Robert was entitled to all the outſtanding debts by virtue of the deviſe of the Book, &c. For he was chargeable with the debts, which might be more or leſs; and he had a right to receive all that the Book would command, in order that he might be enabled to do it. Of courſe, he was not accountable to Archibald for his own debt; for it belonged to himſelf, unleſs it was wanted for the payment of the teſtators debts; which it was not; and therefore he was entitled to the benefit of it.

WICKHAM and RANDOLPH *contra*. The rule of the common law, as to emblements, is admitted; but the act of Aſſembly has wholly reverſed it, and declares that they ſhall be aſſets; that is, perſonal eſtate, to every intent and purpoſe. The caſe, from *Salk.* of the eſtate *pur aute vie*, does not apply; becauſe, in that caſe, the nature of the property was not changed; but it was merely declared to be aſſets; and its qualities of reality remained the ſame as before: So that it was not chattels. But, as none but

chattels are diſtributable, it was properly decided, that the next of kin could not claim a diſtribution of that ſubject. Robert was created an executor by virtue of the deviſe of the Book, &c. and therefore he became a truſtee of the ſurplus, which included his own debt, for the reſiduary legatee; becauſe making him executor did not releaſe the debt, *Brown* vs. *Selwin*, *cas. Temp. Talb.* 240. *Cary* vs. *Goodinge.* 3 *Bro. Ch. rep.* 110. *Toller* 274. This is the ſtronger, becauſe there is a reſiduary bequeſt of every thing, which deſtroys the preſumption, that the teſtator intended the executor ſhould de diſcharged from his own debt. It is therefore like a lapſed legacy, which ſinks into the reſiduum, for the benefit of the reſiduary deviſee, or the next of kin.

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CALL in reply. The deviſe to Robert was a deviſe of the beneficial intereſt in the teſtator's credits, ſubject to the payment of his debts. 1. Becauſe he gives him his Book; which expreſsly denotes property. For directing the book to be given up to him, was ſubſtantially directing that he ſhould take it to his own uſe. 2. Becauſe he was to receive and pay the debts; which condition, as the debts were uncertain, and might exhauſt the whole proceeds, is evidence of property. For it is like a deviſe of lands, with a charge to pay the teſtators debts; which has been conſtantly held to carry a fee. But, as in that caſe he is only liable to the value of the land, ſo, in this, he is only liable to the amount of the money collected from the book. For, in fact, it is no more, in equity, than charging the ſubject, and not the perſon, with payment of the debts. It is expreſsly like the caſe of an executor in general, who takes the eſtate ſubject to the payment of debts; but then he is only liable as far as the eſtate extends. In other words, the teſtator, as to this, has only declared what the law would have implied; but he prevents the ulterior application of it to the claims of legatees, and diſtributees.

If Robert was executor, as they on the other ſide will have it, then the appointment of him to be ex-

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ecutor was a releaſe of his own debt, unleſs it be wanting to pay the demands of the teſtators creditors. This was the rule of the common law expreſsly, *Swinb.* 298, 299. At firſt it was conſidered as inflexible, and admitting of no qualification: But this was a miſtake grounded upon technical arguments, which were ſoon found to be abſurd; and therefore the notion has been long abandoned. For it was very early decided, that it could not be ſupported againſt creditors, *Swinb. ub. ſup.* But as to the legacies, the rule remained longer, and it was thought that the exception, even in favor of creditors, depended upon the liberality of Courts of Equity, who diſregarded the technical conceit, relative to the ſuſpenſe of the action; which for a long time was ſuppoſed to be the true ground why the debts due from executors were extinguiſhed, by appointing them to the office. This however is a miſtake; and the difference, between debts and legacies, depends upon a different reaſon altogether. Which I will endeavour to ſhew, by explaining the real principle.

It never was true, that the reaſon why the debt was extinguiſhed was, that the action was gone; but the actual ground is, that, as the executor is appointed univerſal repreſentative of the perſonalty, it is, impliedly, a deviſe to him of his own debt. This will be evident from the following conſiderations. 1. Becauſe the argument, that the action is ſuſpended, has no meaning when applied to a creditor; for his action never was in ſuſpenſe. *Swinb.* 299. *Roll. ab.* 920, 921. *Salk.* 306. 2. Becauſe, if two be jointly and ſeverally bound, and the creditor makes one executor, this releaſes the debt as to both; and yet the action never was ſuſpended, as to him who was not executor. 3. Becauſe, if the debtor adminiſters, it does not releaſe the debt; and yet the action is as much ſuſpended, in that caſe, as if he were executor. Hence it was ſoon held that the debt, even at law, was liable to creditors. For the executor had it in his hands; and therefore might truly be ſaid to have aſſets ſufficient to ſatisfy the demand. But

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as to legacies the point was more uncertain for a long time. It was often put upon parol teſtimony of the intent, inſtead of conſidering principle: A circumſtance which neceſſarily led to uncertainty; and therefore it becomes important to conſider the principle: which is evidently this, that the appointment of the debtor to be executor does not operate as a releaſe, but is an implied deviſe of the debt to himſelf. *Salk.* 306. Therefore being a legacy, the legatee is entitled to as much favor as any other legatee; and conſequently is not to be deprived of the benefit of the deviſe, without a clear intent, to that effect be manifeſted. So that *prima facie*, the debt is given to the executor as a legatary, unleſs a contrary intention appears by expreſs words, or neceſſary inference. But there are no ſuch expreſs words here; and therefore the queſtion is, whether there be any neceſſary inference? It is ſaid that the reſiduary deviſe amounts to ſuch an inference, and ſhews that the teſtator intended it ſhould not be extinguiſhed. But, in anſwer to this, it is to be obſerved that the executor, having the law on his ſide, has no favor to aſk of the court; and therefore any preſumption, from that circumſtance, is liable to be rebutted by others. Such as, 1. The extraordinary affection which the teſtator always manifeſted for his brother Robert: 2. The teſtators credits being charged with the payment of his debts; which might have exhauſted them. 3 The giving the Book; which was a gift of its contents. 4. The reſidue being coupled with enumerated articles; which ſhews that the teſtator meant thoſe of the ſame kind. 5. The deviſe of the reſidue to Archibald, being only what he had not before given: which did not include Robert's debt; becauſe the deviſe of the Book, which is ſuppoſed to have conſtituted him executor, was inſerted before: And therefore, as according to the rule of law it had been already given, it could not be included in the reſiduary deviſe; which could only be intended of things, not expreſsly, or implicitly, given before.

Hence it appears, that, if the caſe be conſidered upon principle and legal grounds, the appointment

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of Robert to be executor extinguiſhed the debt which he owed, and that it did not paſs over to Archibald, by virtue of the reſiduary deviſe. Becauſe every preſumption, ariſing from that circumſtance, is amply rebutted by others more powerful.

If, however, it be taken that the debt is not releaſed, but the action for it loſt, which is provided againſt by a court of Equity, ſtill the ſame conſequence will take place. No caſe, except thoſe of *Brown* vs *Selwin*, and *Carey* vs *Goodinge*, is recollected to have ſaid the contrary. But with regard to the firſt, the Chancellor merely expreſſes his thoughts upon the queſtion now before the Court, without giving any deciſion. So that it cannot be conſidered as an authority in this caſe. And with reſpect to the ſecond, it is a looſe note of a caſe which does not appear to have been laboriouſly argued, and probably, depended on circumſtances. Beſides, it was only an interlocutory decree; and might have been afterwards changed at the final hearing. Therefore, that caſe alſo, is not to be conſidered as an authority in the preſent. The paſſage from *Toller* is bottomed on it, however; and, of courſe, as the prop fails, the authority of that paſſage fails too. Beſides it is obſervable, that *Fonblanque*, who is a moſt excellent commentator, ſays nothing about it, although he has occaſion once to mention the caſe of *Carey* vs *Goodinge*: which looks as if he did not conſider it as ſettled.

If it be ſaid that here a particular eſtate is deviſed to the executor, which is inconſiſtent with the notion of his taking what is undeviſed; and, therefore, as his own debt is not particularly deviſed to him, it remained undiſpoſed of, & conſequently paſſed under the reſiduary deviſe to Archibald, I anſwer, that as, by the rule of law the appointment of an executor is a bequeſt to him of his own debt, the further deviſe is unimportant; and does not effect the caſe. For the rule, mentioned by Lord Loughborough 2. *Vez. jr.* 80, is univerſal, namely, "That for a le-

"gacy to take away the right of the executor, it is "not ſufficient ſimply to ſay, there is a legacy; but "it muſt be ſo qualified, that the giving of it is in- "conſiſtent with the ſuppoſition, that the executor "is to take the whole." According to which doctrine, it is not ſufficient for the appellee to ſay, that there was a deviſe to Robert of other things in particular, and that the reſidue was given to himſelf; but he muſt ſhew, that the teſtator intended to overthrow the rule of law, and to give this debt to the reſiduary deviſee. This however he cannot do; for there is no inconſiſtency in Roberts retaining his debt, and Archibalds taking the reſiduary eſtate; of which there was amply enough to ſatisfy the words of the will. Therefore Archibald is not entitled to this debt; but it is extinguiſhed for the benefit of Robert's eſtate.

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The deviſe of the lands to Robert carried the emblements growing at his death. As to which, the caſe cited from *Salk.* by Mr. Warden, expreſsly applies, For the eſtate *pur autre vie*, and the emblements are exactly alike, as both equally partake of the realty; and both are declared aſſets: Which declaration has no greater effect on the emblements than on the life eſtate. Therefore one is juſt as diſtributable as the other; being equally capable of diviſion, and diſtribution; for both may be ſold, or ſeparate intereſts given, in the ſubject itſelf, to the diſtributees. But independent of this, the teſtators meaning, to that effect, is collectable from the will. For he deviſes plantations in the ſame manner to all his brothers; and therefore the fair preſumption is, that he intended each ſhould reap the emblements growing on his own; and not that the executor only ſhould be accountable for his.

PENDLETON Preſident. The caſe is as follows: Edward Bolling, having by will deviſed lands and ſome ſlaves to his four brothers, and

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made some other bequests, among which is a legacy of £ 100 to his sister Sarah Tazwell, adds this clause: "It is my will and desire that my *Book* be "given up to my brother Robert Bolling, and that "he receive all the debts due to me, and pay all "that I owe. The rest of my estate, negroes, hor-"ses, clothes, and every other part of my estate, "not already given, I give to my brother Archi-"bald, for him and his heirs for ever." The testator died in August 1770, and probate of his will was granted to Robert, as appointed executor, by the above clause relative to the book: In which character he acted, until his death in 1775. The appellant being appointed executor of his will, this suit is brought by Archibald Bolling, to have an account of the executorship settled, and what shall appear due to him of the residuary estate decreed. He particularly requires an account of the crops made, on the several plantations devised, the year the testator died; and whether he was entitled to such profits? Or whether they passed to the several devisees of the land? Is the first question to be decided by the Court. It was truly said, by the counsel, that, by the common law of England, emblements upon lands devised go with the lands; but our act of Assembly has controlled that common law, by declaring that when a testator dies, at the season of the year in which Mr. Bolling died, they shall not so pass (I mean the growing crop;) but that such crop shall be finished, and, after easing the lands of the quit rents of that year, and the slaves of levies and cloathing out of those crops, the surplus shall be assets in the hands of the executor, placing this devise upon the same ground as if it had been directed to take effect in december. But we have had learned discussions upon the derivation and meaning of this term *assets*; and, from thence, it was attempted to shew, that the executor was only to take it for the purpose of paying debts, if necessary; and as that necessity did not occur in the present case, the law did not operate, but the surplus of those

crops paſſed to the deviſees of the land. This argument the court think has no force, and that, under the act, they are perſonal eſtate in the hands of the executor to every purpoſe of paying debts, ſubject to the diſpoſition of the will; and, if there be none ſuch, the queſtion occurs, whether the executor ſhall take them as undiſpoſed of, or they ſhall be diſtributable to the next of kin, as was fully ſettled by the court, on mature deliberation, in the caſe of *Shelton* vs *Shelton*, 1 *Wash.* 2 In that caſe, there was no diſpoſition of the ſurplus, and the court determined upon that will, and the Engliſh authorities, that the ſurplus belonged to the executors. A queſtion however, which cannot ariſe in the preſent caſe; ſince the ſweeping reſiduary clauſe paſſes every thing undiſpoſed of to Archibald. Upon this point therefore the court is of opinion, that the decree is right. The next queſtion diſcuſſed was, whether Robert Bolling, under the deviſe reſpecting the *book*, was entitled to the ſurplus of the debts due to the teſtator, after paying his debts? Upon this point, the court is of opinion, that no beneficial intereſt in the debts, paſſed to Robert, but it was merely an appointment of him to perform the office of executor, to receive and pay debts. That uſe has been made of the words as conſtituting him executor; and although, probably, his appointment ought to have been confined to that particular duty, yet ſince he was admitted to the office generally, at his requeſt by the county court, who had juriſdiction on the ſubject, and that ſentence remains unreverſed, the propriety of it is not now to be queſtioned; eſpecially as Robert acted under it, as giving him a general authority. That the teſtator intended to deviſe this ſurplus, cannot be inferred from the words of the will; and although the anſwer ſays, that the defendant hopes to prove that ſuch was his intention, yet no proof to that purpoſe, if admiſſible, is brought forth. The words, "*the book be given up*," relate to the poſſeſſion, and not to the property in

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the book, so as to make it apply to the argument, that by giving the book all its benefits passed, like the case of a devise of a bond. Robert Bollings power, under this devise, was, merely, that of an executor, giving him neither a right to the surplus of the debts, if there was any, nor subjecting him to the payment of more than he received. The decree therefore in this point is also right. The third question is whether the debt due from Robert to the testator was extinguished by the appointment of Robert executor? There are no words in the devise to shew that this debt was not to be collected, or accounted for, altho the same hand was to pay and receive, as well as all others; so that it depends upon the general rule. That the debt was extinguished at law is indisputable; and though judges differ as to the reason on which the rule is founded, that seems immaterial; since we are to consider what is the equitable rule on the subject? Many cases were cited to favour the executors interest; but they were generally on questions between the executor and next of kin, whether an *undisposed* of surplus should be distributed; and do not apply to this case, where the residuary clause prevents the existence of any such surplus. It seems to be settled in equity, partly in *Brown* vs *Selwin*, *Cases Temp*: *Talbot* 240, and in *Carey* vs *Goodinge* 3 *Brown* 110, that the debt is not extinguished, but is to be accounted for as assetts; subject to debts, and legacies, and distributable, except in cases where the executor is entitled to the surplus. The appellee is a legatee, and the decree in his favour on this point also is right.

The other questions being only provisional, in case of a contrary decision of the second question, are, by the decision of that, rendered unimportant; since they will be regulated in the account of administration, which will shew what the residuary legatee is entitled to. Upon the whole the decree of the Court of Chancery is affirmed.

JORDAN *against* MURRAY.

JORDAN and others brought detinue againſt Murray for ſome ſlaves. Plea *non detinet* and the act of limitations. Iſſue. Upon the trial of the cauſe the jury found a ſpecial verdict, which ſtated that John Armſtead, in 1763, made a parol gift of a ſlave, by the name of Nan, to William Ruſſel (father of the female plaintiffs) who had married Sarah the daughter of the ſaid John Armſtead, and mother of the plaintiffs. That, about the year 1765, the ſaid Nan, who had been in poſſeſſion of the ſaid William Ruſſell, from the date of the parol gift aforeſaid, had iſſue a daughter by the name of *Moll*. That, in 1769, the ſaid John Armſtead made his will, and thereby deviſed the ſaid ſlave Moll and her increaſe to his ſaid daughter Sarah for her life, and at her death to be equally divided among her children *then living*. That after the death of the ſaid John Armſtead, and the recording of his will, John Murray the teſtator of the defendant purchaſed the ſaid ſlave Moll of the ſaid William Ruſſell for a valuable conſideration. That the ſaid Moll is the mother of the other ſlaves in the declaration mentioned, who were born after Murray's purchaſe as aforeſaid. That the ſaid ſlaves are in the poſſeſſion of the defendants. That the ſaid Sarah ſurvived her huſband, but died within five years next before the inſtitution of the ſuit. That the ſaid William Ruſſell was in poſſeſſion of *Nan*, under the parol gift aforeſaid, for more than five years, before the purchaſe of Moll by the ſaid Murray as aforeſaid.

Altho under the act of 1758 evidence of a parol gift of ſlaves cannot be given, yet ſuch teſtimony may be received, in order to prove the five years poſſeſſion, ſo as to bar the plaintiffs demand.

The Diſtrict Court gave judgment in favour of the defendants; and the plaintiffs petitioned this court for a writ of *ſupersedeas* to that judgment; and aſſigned the following reaſon, "That as by the "act of 1758, parol gifts of ſlaves are *void*, and by "the deciſion of this Court evidence of a parol "gift is inadmiſſible; the judgment of the Diſtrict Court ought to be reverſed.

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PENDLETON Prefident, after ſtating the caſe, delivered the reſolution of the Court as follows.

In *Turner* vs. *Turner*, * the plaintiff claimed under a parol gift, and the court below admitted evidence of ſuch gift, which this court adjudged could not be admitted, under the act of 1758.

Although, under that act, the parol gift did not paſs the property in the ſlave *Nan* to Ruſſel, yet this poſſeſſion of more than five years in Armſteads lifetime, barred the title of the latter, and prevented his power of diſpoſition by his will; more eſpecially in this caſe of a *bona fide* purchaſer from the poſſeſſor.

The *Supersedeas* is therefore unanimouſly denied.

* *Wash.*

SKIPWITH, *against* CLINCH.

If the defendant appeals from a decree of the High Ct. of Chancery pronounced on a *forthcoming bond*, the Ct. of Appeals may allow 10 per ct. damages for his retarding the execution of the decree.

THE queſtion in this caſe was, whether this Court upon affirming a decree of the High Court of Chancery pronounced on a motion upon a forthcoming bond taken on an execution iſſued upon a decree of that Court, can give ten per ct. damages againſt the appellant for retarding the execution of the decree?

WICKHAM & WARDEN for the appellee. Altho there is no act of Aſſembly which gives damages in expreſs words, yet they may be allowed in conſequence of the act which gives the ſame executions upon decrees in chancery, as upon judgments in courts of common law. *Rev. code.* Becauſe that act declares that the ſame proceedings may be had upon ſuch executions as upon thoſe iſſued from the courts

of common law; and therefore, as damages is one of the conſequences of an appeal from a judgment of a court of common law rendered on a forthcoming bond, it follows that they may alſo be allowed upon an appeal from a decree in Chancery upon ſuch a bond.

RANDOLPH *contra.* That act only relates to the proceedings upon the execution whilſt they are going on under the controul of the Court of Chancery; and does not extend to the proceedings in the appellate court; which is a ſeparate juriſdiction, and whoſe proceedings are entirely extraneous and diſtinct from thoſe of the inferior court upon the execution itſelf. Of courſe the declaration, in that act, that the ſame proceedings ſhall be had upon the execution as upon thoſe iſſued from the courts of common law, is to be underſtood of the proceedings had in the inferior court itſelf; and not to thoſe which are tranſacted in the court of error. This argument receives additional weight from the conſideration that the damages are a penalty; and therefore expreſs words are neceſſary in order to create them. Conſequently as there are none ſuch in the act, they connot be allowed by the Court.

Cur adv. vult.

PENDLETON Preſident, Delivered the reſolution of the Court as follows: This is an appeal from the High Court of Chancery for the amount of a forthcoming bond, taken by the ſheriff on a writ of *fieri facias*, iſſued from that Court upon a decree for the payment of money. The appellant made no objection to the decree on the forthcoming bond in the Court of Chancery, although he appealed from it; nor has he attempted, here, to ſhew any error in the record; and none is diſcovered by the Court. Therefore the decree is affirmed. But a queſtion occurs, whether the legal damages ought not to be awarded, in conſequence of the affirmance, as is done on common law judg-

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ments, upon such bonds taken upon common law executions? It cannot be doubted but there is the same reason for giving damages on this appeal and in all appeals from decrees for payment of money, as on one from a judgment at law of the same sort; but in general the act permitting appeals in chancery does not authorize the awarding damages as it does in common law cases, probably because chancery causes generally depend upon complex and difficult questions, the principles of which ought to be settled by the supreme court; and therefore appeals in those, seldom practiced merely for delay, are not discouraged: this, or some such reason, occasioned the distinction, and not because chancery courts do not decree penalties; for I do not consider these damages as a penalty, but as a retribution for the extraordinary expence and trouble of the party in defending the appeal, not allowed in the bill of costs. Altho the law does not allow damages in chancery cases in general, yet there are no negative words in the act to restrain them, but it leaves them open for allowance in particular cases authorised by the Legislature: and such a case I take the present to be. By the execution law of 1793 sect 53, parties are allowed to sue out common law executions upon decrees in chancery, and of course a *fieri facias* upon a decree for money in the present case: which execution the law declares shall be executed and returned, and have the same operation and force, to all intents and purposes, as similar process at common law. The law has not limited the operation, nor drawn the line where it is to stop. The court cannot draw that line, but is of opinion the operation must continue throughout, till the money is paid; and award the damages as part of that operation.

WILLIAM ALEXANDER, &c. Appellants,

against

ROBERT MORRIS Appellee.

WILLIAM ALEXANDER, Appellant,

against

ROBERT MORRIS, Appellee.

WM. ALEXANDER, & Co. Appellants,

against

JOHN TAYLOE GRIFFIN, Appellee.

WILLIAM ALEXANDER, Appellant on behalf of himself & Company,

against

J. T. GRIFFIN & R. MORRIS, Appellees.

ALEXANDER J. ALEXANDER, Appellant,

against

J. T. GRIFFIN, R. MORRIS, W. ALEXANDER, GEORGE GRAY, & E. M'NAIR, Appellees.

THESE five ſuits, which are appeals from the High Court of Chancery, are ſo interwoven with each other, as in truth to conſtitute different points in the ſame cauſe. The general hiſtory of which, as collected from the various bills and anſwers, is as follows.

The owner of particular certificates, will be entitled to a decree for the certificates themſelves if to be had, and if not, to their value at the time of the decree.

Robert Morris alledges that, in 1783, overtures were made to him by the Farmers General of France for a contract for Tobacco. That delicacy prevented him from purſuing the ſubject,

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A factor, indebted to his principal at the time, cannot ſell the property of the principal, to pay indorſements in the courſe of his factorage. Nor can a factor buy up the debts of his principal at an under rate and claim credit for the nominal amount; but in ſuch a caſe he will only be allowed what he actually paid, although the purchaſe was made after the factorage had ceaſed, and the principal had brought ſuit for an account

A depoſition taken after an appeal from an interlocutory decree in chancery may be read upon the hearing of the appeal.

he having received information, from Jonathan Williams (the ſon-in-law of William Alexander,) that they had made a contract with the Farmers for ſupplying them with Tobacco. That this information, though incorrect in its full extent, terminated in Morris's aſſociating himſelf with Williams and William Alexander in a contract for 15000 hogſheads per annum, for three years, to be furniſhed to the Farmers General. That afterwards, in January 1785, a contract with the Farmers General was propoſed to Robert Morris; which he confirmed in April 1785, for the ſhipment of 60,000 hogſheads of Tobacco in the years 1785, 1786, and 1787. That William Alexander was to have a ſhare in this contract, but its rate was not abſolutely fixed, though he entered upon the purchaſe of Tobacco, with Robert Morris's funds, and continued therein, until the 6th day of July 1786; when he Robert Morris took upon himſelf the great loſs ſuſtained in the ſhipment of 2000 hhds. which had been ſhipped upon an experiment, and agreed to give William Alexander a dollar per hogshead for the 60,000 hhds. beſides a certain commiſſion, charges and allowance to ſub agents. That Robert Morris furniſhed neceſſary funds to a large amount; but William Alexander failed in his part of the contract, whereby Robert Morris's credit was ruined and himſelf impoveriſhed. That William Alexander ſpeculated with Robert Morris's funds, and made great profits to himſelf. That among the acquiſitions, made with the funds of Robert Morris, were upwards of 56,000 dollars in military certificates, depoſited by John Tayloe Griffin on account of a loan made by William Alexander to the ſaid Griffin by the expreſs direction of Robert Morris himſelf, on whoſe proper account the tranſaction was. That William Alexander has refuſed to account, and pay the balance due to Robert Morris, and to deliver to him the certificates aforeſaid, of which Robert Morris is the owner. Wherefore Robert Morris prays

that William Alexander may be compelled to pay the balance and deliver the certificates.

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On the other hand, William Alexander inſiſts that his credit and influence greatly contributed to the promotion of the contract with the Farmers General; and, if Robert Morris had not diverted the funds advanced by them, to other purpoſes than thoſe of the contract, the buſineſs might have been perfected with great advantage. That, in the ſettlement of his accounts, he is entitled to credit for various articles, the moſt prominent of which are 1. A dollar per hogſhead on 20,000 hogſheads, which Robert Morris was at liberty to ſhip to the Farmers General under a permiſſion given ſubſequently to the contract in April 1785; but which were never ſhipped. 2. Counting houſe expences. 3. The cargo of the Ship Maryanne. That he is alſo entitled to retain the certificates of John Tayloe Griffin, they having been ſold to indemnify William Alexander while he was a creditor of Rober Morris, for his indorſements on certain bills of exchange drawn by Robert Morris, and proteſted; and that Alexander John Alexander was a purchaſer of ſome in ſatisfaction of one of thoſe bills. That William Alexander is alſo entitled to a diſcount for 110,000 dollars in the notes of Robert Morris, indorſed by John Nicholſon, or of John Nicholſon indorſed by Robert Morris.

The Court of Chancery decreed in favour of Robert Morris; and thereupon Alexander appealed to this Court.

HAY for the appellant. Alexander was entitled to a commiſſion of a dollar per hogſhead on 80,000 hogſheads, becauſe the farmers general had agreed to take that quantity, and it was the failure of Morris's funds which prevented his compliance with the agreement. Of courſe, as the diſappointment aroſe from his own delinquency, his agent is

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not to be prejudiced thereby; but ſhould have the ſame compenſation as he would have been entitled to, if the agreement had been carried into effect; eſpecially, as the money advanced to Morris, by the Farmers General, would have enabled him to carry the contract into complete effect, if he had managed it judiciouſly. The houſehold expences were incurred for the benefit of the factorage, and therefore under the agreement, ought to be borne by Morris. The contract with Griffin was made out of Alexander's own funds, and Morris was only to have the tobacco, if paid: The certificates were pledged to Alexander himſelf, and conſequently he alone was entitled to them; but, if not, ſtill he had a lien on them for the balance of his account *Cowp.* 251; and, as payment of the bill endorſed by him was demanded, ſome ſuits brought, and others threatened, he was juſtifiable in ſelling the certificates to pay the bills. Part of the certificates were bought by John Alexander, who was an innocent purchaſer, and conſequently entitled to hold them. In any event, Alexander is only liable for the value of the certificates, when ſold, and Morris is not entitled to a decree for the certificates themſelves, or for their preſent value. *Graves* vs. *Groves*, 1 *Waſh.* 1. But be this as it may, Alexander was clearly entitled to diſcount the notes of Morris, at their nominal value, againſt the balance in his hands; for, if he owed Morris on the account, and Morris owed him on the notes, the one ought to be a *ſet off* againſt the other; which argument is the ſtronger, as there could not be any pretext of a truſt, at the time the notes were purchaſed; for the factorage had long before ceaſed, and the tranſactions between the parties, had all determined.

CALL and RANDOLPH *contra.* Morris never was authoriſed to ſhip the additional 20,000 hogſheads in the year 1788; for, by the terms of the correſpondence and agreement, they were to be ſhipped within the ſame periods as the firſt 60,000 were;

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that is to say, within the year 1785, 1786, 1787: and the evidence clearly proves that Alexander could not ship them within that period, although furnished with ample means for the purpose. It is therefore preposterous to demand compensation for a service which he could not perform. Besides, if it were otherwise, the most which could be demanded would be damages for breach of the agreement, and not a full commission upon the whole; because, in fact, he has not done the service, for which it would have been payable. The household expences were chiefly incurred for business, carried on by Alexander on his own account, independant of the factorage, and therefore he ought to bear them. The advances to Griffin were out of Morris's funds, and the contract expresly made on his own account, at his own request, and in consequence of his own treaty. Of course, Alexander could have no right to them, upon the ground of the contract. Nor had he any just pretence for selling them; but the alledged sale, was altogether unauthorised and illegal. For he did not acquire them in the course of his factorage, but merely as the friend of Morris, upon a transaction entirely out of the line of the factorage. But, if it were even otherwise, still that did not authorise the sale; because it was unnecessary. For there was no judgment against him; and no case proves that a factor can sell the property of his principal, before actual damage, upon a mere apprehension of possible danger. Besides, he was actually a debtor at the time, and had not only refused an indemnity, but declared that he would not retain the funds in his hands. The sale therefore was clearly illegal; and Morris is entitled to the certificates themselves, which remain in specie, and to the value of the rest, at the time of the decree *Reynolds*, vs. *Waller*, 1 *Wash.* 164. *Wilson* vs *Rucker*, 1 *Call*, 500. Which cases prove a difference between a contract for certificates, and a right to a particular set of certificates. The first, from its very nature, being the subject of damages, the damages ought

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to be according to the period when the breach accrued; but the latter being the ſpecific property of the owner, he may aſſert his right to it wherever he finds it, or the value, in caſe of failure to deliver it; which is the ſtronger, when it is conſidered that if trover or detinue were brought, the value would be ſettled, at the time of the verdict. John Alexander's claim will form no exception. 1 Becauſe the purchaſe itſelf is ſubverted and overthrown by all the teſtimony in the cauſe; for the very bill with which it is alledged to have been bought, is proved to have been retired into Morris's own hands, before the date of the alledged purchaſe. 2 Becauſe the caſe of *Wilſon* vs *Rucker*, 1 *Call*, 500 proves that the true owner may purſue the certificates into the hands of any holder, although that holder be an innocent purchaſer, without notice. Alexander cannot diſcount the notes of Morris, at more than he paid for them, either againſt the certificates which remain in ſpecie, or againſt the value of the reſidue. Not againſt the firſt: Becauſe a diſcount can only be againſt things of the ſame kind, and due in the ſame right, *Ayliff. Pand. civ. L.* 573. 1 *Dom. civ L.* 491 IX. 6 *Bac. abr.* 135, 137. Not againſt the ſecond: 1 Becauſe a truſtee, or one ſtanding in a fiduciary character, will not be allowed more for *compoſitions* than he actually paid for them: which is not grounded merely on the notion that he is *tranſacting* for the benefit of the truſt, but upon the principle of *utility* alſo, in order to remove the temptation to injuſtice through the hopes of retaining the fund, until the decline of the principals affairs ſhould bring down his papers to an under rate. 2 *Fonb Eq.* 191, *Ld. Kaim's Princ. Eq.* 24, 176. Nor does the *ceaſing* of the truſt, as it is called, alter the rule, according to the argument on the other ſide: Becauſe that would tend to encourage miſconduct, as the agent would have nothing to do, but to ſell the property, and then claim rights which he could not have pretended to before. It is no anſwer to ſay that the principal

in ſuch caſes ſuſtains no injury. 1. Becauſe, independent of the bad tendency of it, the creditors of the principal have an intereſt in the ſubject; for the truſtee is, in conſcience, bound to yield it up for their benefit; and therefore cannot for the ſake of his own intereſt, drive them through deſpair, to take leſs than the amount, *Franc. Maxims* 9, 64, 65. Which applies with more force here, where a ſuit was actually depending, and the fund under the controul of the Court. 2dly. Becauſe the depoſition of Cottinger proves the notes to have iſſued on an illegal conſideration; and therefore equity will not oblige Morris to allow more than was advanced upon them.

WICKHAM in reply. Cottingers depoſition was taken after the appeal and therefore cannot be read at this time. None of the Engliſh caſes upon the ſubject of diſcount, reſemble this; and thoſe ſtated by *Lord Kaims*, were fanciful ones of his own creation. Tobacco may be diſcounted againſt money, and money againſt certificates, then why not notes againſt certificates? For money and Tobacco, or money and certificates differ as much, or more, in their nature, than certificates and notes. The pendency of the ſuit, at the time of the purchaſe of the notes, does not alter the caſe; and, as the property of the notes was in Alexander, he was entitled to all which they would command; that is to ſay, to the ſum for which they iſſued, unleſs any payments can be proved. Therefore, he ought to have credit for their full amount.

Cur adv. vult.

PENDLETON Preſident, Delivered the reſolution of the Court, as follows.

In theſe voluminous and complex caſes the Court have taken up the points diſcuſſed diſtinct-

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ly; and will occaſionally ſtate the papers and correſpondence, applicable to each queſtion as they ſhall occur.

The traſactions, between the parties, took riſe from an agreement in November 1783, between Mr. Alexander and Jonathan Williams; by which they agree to be jointly employed in ſupplying the Farmers General of France with Tobacco; each to ſupply 100,000 livres for the purpoſe. Alexander to come to, and ſettle in Virginia, in order to buy and ſhip the Tobacco; and Williams to ſettle in France, to do the buſineſs there; Neither was to charge for his *labour*; but to be allowed all neceſſary expences of houſekeeping, travelling, clerks &c. of which, their reſpective books were to be evidence. Alexander was empowered to take in a partner in America; and, in March 1784, aſſumed Mr. Morris as a partner, one third concerned in the agreement; and all extenſion, or alteration, which might take place was to be by common conſent: Morris to have a third of gain, and bear a third of loſs, but to have no allowance for *ſervices*, except actual expences incurred.

Morris, thus introduced, made a new contract with Le Normand, Receiver General of the finances of France, for the delivery of 60,000 hogſheads of Tobacco, in the years 1785, 1786, 1787; for which he was to receive 36 livres per hundred, to be paid to the Bankers Le Couteulx & Co. retaining two livres *per centum* to reimburſe a million of livres, which was to be immediately advanced to Morris. Under theſe contracts Mr. Alexander continued to purchaſe and ſhip Tobacco until July 1786. In the mean time, a loſs having been ſuſtained in the ſhipment of 2000 hogſheads, from the high price in Virginia, Le Normand permits Morris to ſhip 20,000 hogſheads more than the 60,000, within the limitted time of three years: Morris to be at liberty to ſhip them, if

convenient; Le Normand bound to take them. July the 6th 1786, Morris and Alexander enter into a new agreement, which reciting the contract with Le Normand, in January 1785, and that Alexander had been employed to superintend the purchase and shipment of Tobacco on terms to be afterwards settled, proceeds to settle the terms, as follows: All Tobacco purchased by, or under the orders of Alexander, since October 1784 till the completion of the contract with Le Normand, were to be on the account and risk of Morris; and Alexander was to account for those, as well as for all gain on the sales of Tobacco purchased, and commissions on purchases made for others: In consideration of which, and as a recompence for his great abilities exerted, and to be exerted, Morris agrees to allow him, over and above all commissions to sub agents and charges, a dollar per hogshead for every hogshead which had been or might be shipped to France, in consequence of the contracts aforesaid; and to allow him 2½ per cent on all tobacco purchased, and not sent to France. Alexander, to retain all profit made by him, by speculations in military certificates, or otherwise.

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Under this agreement Mr. Alexander has credit for his dollar on 60000 hhds. altho so many were not shipped before the end of the year 1787: But his first claim discussed is for 20,000 dollars for the tobacco which Mr. Morris was permitted to ship, if he chose, and did so within that year; the agreement between Morris and Alexander, is in terms confined to the contract for the 60,000 hhds, by reference to that contract for its date; and though both knew at the time that Morris had permission to add the 20,000 hhds, there is no reason to presume they meant to treat of it at all: Their silence, with that knowledge, is opposed to such presumption. It was optional with Morris, and it was precarious, whether it could be procured in time in addition to the 60,000: Besides it being substituted

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to recompenſe a loſs in the 2000 hhds. borne by Morris, and producing a loſs in itſelf, inſtead of a recompenſe, upon Mr. Alexander's own principles, his claim is unfounded, as he would receive the reward for getting rid of a loſing bargain, inſtead of yielding a beneficial intereſt. Altho the agreement did not extend to the 2000 hhds. yet the correſpondence ſhews that Morris meant to allow the ſix ſhillings upon them, if they could be ſhipt in time to entitle him to the profit; and to ſuch intention, the ſtimulus to exertion, "increaſe *my profit* and *your commission*," refers: It could not be purchaſed; Morris loſt the profits; and Alexander's demand of reward, for what he could not do, is unreaſonable. Hints are given, as if both knew that the tobacco would be received in 1788, a fact not proved by any document, and contradicted by the event. Morris made an eſſay, in that year, to diſcover if it would be received. The diſcovery was unfortunate. Much labour was employed, in argument, to ſhew, on one ſide, that Morris did not ſupply funds ſufficient: and, on the other, that Alexander miſapplied the funds furniſhed to his private ſpeculations: Neither is ſatisfactorily proved: For altho Alexander frequently recommends it to Morris to keep him ſupplied, he never ſtates that he loſt a ſingle opportunity of purchaſing, for want of them: The accounts ſhew that there were always conſiderable balances in the hands of him, and of his ſub agents; and tho they conſiſted moſtly in facilities and not ſpecie, thoſe appear generally to have anſwered the purpoſe: In the few inſtances where ſpecie was required and ſent for, it was furniſhed: The detention of the meſſengers, a few days, only proves that the difficulty of procuring, and Morris's anxiety to furniſh, the ſpecie. On the other hand, the court diſcover no proof of Alexander's having uſed the funds for his private ſpeculations. The true cauſe of diſappointment appears, from Alexanders letters, to have been at firſt the high price of tobacco; and afterwards the ſcarcity of that

commodity; of which his ſtrong expreſſions, *that it could not be procured by the aid of the beſt funds of Heaven and earth*, are the moſt concluſive evidence. Upon the whole, the Court is of opinion that this claim was properly rejected by the Court of Chancery.

The ſecond claim is for about £ 1700 for houſehold, or countinghouſe, expences. This is founded on the agreement between Alexander and Williams, wherein it is ſtipulated that ſuch expences of houſekeeping, travelling, clerks, &c. ſhould be allowed; but which does not apply to the preſent contract. By the agreement between Alexander and Williams, as firſt entered into, both were to devote themſelves to that buſineſs only; and to ſettle, one in Virginia, the other in France for carrying it on: Neither was to charge any thing for his labour, but their whole expence of living was to be a common charge: When Morris was taken in, however, a different language is uſed; no mention of houſekeeping, clerks, &c. is made; but he was to be allowed for actual expences incurred. So, in the agreement between Morris and Alexander, charges are to be allowed over and above a large ſalary, and commiſſions to ſub agents. The two auditors, who adjuſted the accounts, well underſtood the common acceptation of *charges* in a mercantile contract of this ſort, to comprehend only real expences paid in the purchaſe and ſhipment of tobacco; ſo much they had allowed in the coſts of tobacco; and therefore they properly rejected the whole claim of £ 1700, including thoſe, and other improper articles. On this point, therefore the Court alſo approve the decree.

The third claim is for the loſs of the tobacco ſhipped in the Maryanne, and the expences on that occaſion. The depoſition of Eddins proves, that the loſs was occaſioned either from the inſufficiency of the *ſhip*, or the bad conduct of the captain and *ſeamen*; and Mr. Alexander muſt bear it, as owner of the former, and anſwerable for the latter. On this point the decree is alſo approved.

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We come then to the fourth, reſpecting Griffins certificates, from which Mr. Alexander inſiſts to be diſcharged, on accounting for the price at which he ſold them, amounting to £ 2571 7 3, which ſale he juſtifies under his contract with Griffin in July 1787, by which he was empowered to ſell them for what they would fetch, to be applied to the purchaſe of the tobacco, as a ſecurity for which they were depoſited.

The whole correſpondence from March 1786 to May 1788, ſhews that it was Morris's money which was advanced to Griffin; the ſecurities his; and the delays in ſelling the certificates, were by his conſent: And why Alexander ſhould complain of Morris's having finally ſettled with Griffin, without conſulting him, is not conceived, unleſs he meant to have added a heavy penalty upon Griffin, to his other gains of that ſort.

On the 3d of May 1788, Morris wrote Alexander that he had ſettled Griffin's debt, and deſired him to deliver Griffin all ſecurities and depoſits taken of him. John Richards and Alexander K. Marſhall prove Griffin's demand, and Alexander's refuſal; and the latter adds that Alexander ſaid he retained them as his property, and that Griffin ſaid he ſhould hold Alexander reſponſible for the certificates. Alexander's letters to Morris, of May 1ſt and 6th, ſtate, that he retained the certificates as an indemnity againſt Morris's proteſts; and for the ſame reaſon he refuſed to transfer vouchers for the outſtanding debts, but ſaid he was ready to do both, on having theſe proteſts produced, cancelled or himſelf diſcharged. At that time the certificates were all in his hands, the ſale of which he did not commence until the 16th of May: and we come to conſider whether thoſe ſales were juſtifiable? That the certificates were the ſpecific property of Morris, in the hands of Alexander as his agent, is unqueſtionable; and that an agent or factor may *retain* ſuch property, as ſecurity for a

debt due, or as an indemnity againſt engagements for the principal, is alſo clear. But whether he can ſell ſuch property, depends on the circumſtances of each particular caſe, inducing a neceſſity for a ſale to anſwer thoſe purpoſes; and the circumſtances ought to be ſtrong, where, as in the preſent caſe, the ſale was forbid by the proprietor.

The general principle laid down by Lord Manſfield, in *Drinkard*, &c. vs. *Goodwin*, *Cowp.* 251, is that a factor, who receives cloths and is *authoriſed to ſell them*, makes the buyer debtor to himſelf, and tho he is not anſwerable for the debt, he has a right to receive the money, his receipt diſcharges the buyer, he may compel payment by ſuit, in which caſe the buyer could not defend himſelf by ſhewing that the principal was indebted to him; for the principal can never ſay *that*, but where nothing is due to the factor. The circumſtances there were very ſtrong, the factor when he became ſecurity ſtipulated that the money borrowed ſhould paſs through his hands to the principal, a clothier who was to ſend his cloth to ſell *as uſual*, for his ſecurity: But, in the preſent caſe, the ſale of theſe certificates was not within the ordinary agency of Alexander. They were depoſited as a pledge for Morris's money advanced, and ſubject to his controul. He did not *authoriſe*, but *forbid* the ſale; and it can only be juſtified, if at all, by ſhewing that money was then due to the agent, or that a ſale was neceſſary to exonerate him from his engagements for Morris. That Alexander was not a creditor at the time, but a debtor to upwards of £ 6000, appears from the account ſettled; and he muſt ſhew that his engagements required it, in order to juſtify the ſale. The bills *really paid* are charged to Morris in the accounts ſettled, amongſt which are Mr. Alexander John Alexanders; which, in his account current March 28, 1783, he charges to Morris, with the intereſt and charges, amounting to £ 2191 3 7 currency, at the foot of that account he ſtates a liſt of bills returned and unſettled, amounting to £ 3600 ſterling, a ſum not

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equal to the balance he owed; and would not juſtify a ſale of the certificates, even if he had been preſſed for payment, which is not ſhewn. Whether theſe bills have been ſince paid by either party, or were endorſed by Alexander, does not appear, except that Morris ſays in his anſwer, that Alexander has paid part of them, which is credited to him in the account ſettled. If they are yet outſtanding, and were endorſed by Alexander, he ought to be indemnified by Morris againſt them. No other proteſts appear, except thoſe on which judgments have been recovered by Stott & Donaldſon; which judgments Mr. Morris ſwears in his anſwer to the laſt bill he paid to thoſe creditors in 1793, and took an aſſignment of the judgments, on which he ought to give a releaſe to Alexander, which will amount to an indemnity of the bail. There not appearing then any preſſing neceſſity for a ſale of the certificates on account of thoſe proteſts, Alexander had no power to ſell; but ought to be conſidered as having retained them, and to be made ſo accountable. For, tho depoſited with Gray and M'Nair, there ſeems to be no queſtion but they are to be ſpecifically delivered, on thoſe defendants being indemnified as bail for Alexander, at the ſuit of Stott & Donaldſon. As to the balance, Alexander is, by the decree, to procure and transfer ſtock of equal value, or compenſate for their preſent value, to be ſettled by a jury. This is objected to, and it is urged that the price they ſold for, or the real value, at that time, ought to be the rule. After reaſoning by analogy to the caſe of trover on one ſide, and detinue on the other, which did not ſupport the objection, ſince Morris had the option, which of thoſe ſuits he would commence, the counſel recurred to caſes in this court. *Graves* vs *Groves* was a contract to deliver, on a fixed day, certificates of a certain deſcription, but no *ſpecific* paper; and the principal reaſon, for fixing the value at that day, was, that Groves was not afterwards obliged to take the paper if depreciated; and therefore ought not

to have the gain by their riſe: But this is not the caſe of property in ſpecific paper; which remains at the riſk of the proprietor, for gain or loſs; and ſo it was determined in the caſes of *Reynolds* vs. *Waller*, and *Wilson* vs. *Rucker*. In both which, the value, at the time of the recovery, was the rule. Of this reſponſibility Alexander was warned before the ſale; and any hardſhip in the caſe, he has brought on himſelf, by his own miſconduct. On this point therefore the decree is alſo right; as is the diſmiſſion of the bill of Alexander John Alexander, as his proteſts were given up and charged to Morris before the ſale, when Morris ceaſed to be his debtor, and he became a creditor of William Alexander & company only.

We now come to the laſt point, whether alexander ſhall be allowed to diſcount the notes of Morris and Nicholſon at their nominal value, or at the price which he paid for them? The latter is the decree, and that price to be ſettled by a jury. The queſtion is important in value, but the only difficulty is to decide between two men, both of whom appear to have done wrong, on which of them the injury ſhall fall. On the one hand it is impoſſible to juſtify Morris, whether his conduct proceeded from his diſtreſs, or an inſatiable thirſt for riches, in coining theſe millions of notes, to circulate under a promiſe to redeem them at full ſpecie value, which he muſt have known he would not be able to do; and that the world would be thereby deceived. According to his account however mankind was not wholly deceived; they got into circulation by his depoſiting them, in heaps, for money borrowed, and their value to him was what they would ſell for. And thoſe ſales gave a tone to their depreciation from time to time, as a rate at which they were generally paſſed between individuals. Of theſe depoſits and ſales we have no account, till 1796, when ſome were depoſited at two ſhillings in the pound, and which ſold afterwards, in February 1797, at 12 cents, ſomething leſs than

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nine pence; at which rate Williams purchaſed at leaſt 64.000 dollars of the notes now offered in diſcount; for that they are the ſame notes appears from a compariſon of three liſts, one by each of the brokers Amridge, and Biddle, and the other by Alexander, all agreeing, ſo far as date, number and ſums. The value Williams paid for them appears in Biddles depoſition. He received them in exchange for old notes, which were ſold for leſs than the new ones, and he paid Biddle one cent per pound for the difference.

Here it may be neceſſary to obſerve that the court allow the depoſitions to be read, tho taken after the decree and appeal, ſince they relate to the ſubject of diſcount; as to which, the ſuits are to be conſidered as yet depending in the Court of Chancery, of which Morris ought not to be deprived, by the appeal having been granted before the final decree. The commiſſions were properly awarded, and the depoſitions taken in preſence of the attorney of Alexander.

Having ſtated the ſituation of Morris, what is that of Alexander? After ſuits depending near 10 years, and the accounts between the parties are adjuſted, he is found to be a fair debtor to Morris in a large ſum; upon which he buys up thoſe notes at about nine pence in the pound, and claims a diſcount for them at twenty ſhillings. Was he deceived by the import of the notes? William Marſhals depoſition ſhews his opinion of the value of thoſe notes in ſummer 1797; when he declared that he did not poſſeſs, nor would he be concerned with, one of them; and adviſed Mr. Marſhall not to be concerned with any more: Or is he injured by being allowed the ſpecie he really paid, as if he had paid that to Morris? It is believed that the widows and orphans ſpoken of, and all others, holding Morris's notes, would be glad to be ſo paid for them.

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In 6th *Bacon*, 137, it is ſaid as in caſe of Bankruptcy the debt claimed to be ſet off muſt have exiſted at the time of the bankruptcy, ſo in *other caſes* it muſt be in exiſtance at the time of commencing the ſuit; for which he refers to the 3 *Term rep.* 386, 2 *Bur.* 1229: Which is ſurely very reaſonable, it being improper for a debtor after ſuit, to trump up claims againſt his creditors in order to diſcount them, eſpecially when purchaſed at an under rate. The counſel aware of this, and that this is the caſe at law, claims the diſcount as an equity, and juſtifies the advantage gained in the purchaſe, as a balance for the loſs in the certificates. Mr. Alexander's opinion of that loſs, may juſtify his morality in the attempt; but the Court having decided that the claim of Morris to the certificates is juſt, and that the loſs if any was occaſioned by Alexanders own fault, that loſs can give him no equity to extend the value of his diſcounts.

Upon the whole, the Court is of opinion that the decrees are all right as far as they go, but that Morris's recovery ought to be ſuſpended, until he ſhall releaſe the judgments of Stott and Donaldſon, and indemnify Alexander againſt the outſtanding bills, if any indorſed by him, or allow him credit for their amount: And, with this direction, the decrees are affirmed, with coſts.

TOMLINSON *againſt* DILLIARD.

By the act of 1792, the perſonal eſtate is diſtributable among the perſons entitled;

TOMLINSON and others brought a bill againſt Dilliard in the High Court of Chancery ſtating, that the plaintiffs are, ſome of them, the brothers and ſiſters, and the reſt deſcendants of the brothers and ſiſters of Benjamin Tom-

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to the real; & therefore the mother of a deceaſed infant is not entitled to any part of his perſonal eſtate derived from the father.

linſon deceaſed. That the ſaid Benjamin Tomlinſon died February 1. 1791, leaving a will, whereby he gave his wife, Nancey Edloe Tomlinſon, one moiety of a tract of land in Greenſville county, in fee ſimple; together with the uſe of the plantation, in Greenſville county aforeſaid, whereon he lived, during her natural life: And then deviſed as follows, "Item, whereas my ſaid "wife appears to be pregnant at this time, I give "all the reſt and reſidue of my eſtate real and per- "ſonal to ſuch child or children as may be born "from my intermarriage with her; if ſhe ſhould "bring forth more than one, to be equally divi- "ded ſhare and ſhare alike: If but one, I give "the whole of the ſaid reſidue of my eſtate to that "one, whether male or female, and to his or her "(as the caſe may be) heirs forever." That after the teſtators death, the ſaid Nancey Edloe Tomlinſon the wife was delivered of a ſon called Benjamin Edloe Tomlinſon; and in the year 1798 ſhe intermarried with the defendant George Dilliard. That the property deviſed to the wife included *all that, and much more than the testator received by her.* That the teſtator's ſaid ſon died on the 3d September 1798, at about 18 months of age, leaving the ſaid Nancey Edloe, his mother, who was at that time the wife of the defendant George Dilliard. That the ſaid Nancey Edloe Dilliard ſurvived her ſon the ſaid Benjamin Edloe Tomlinſon but a very ſhort time, and then died, leaving the ſaid defendant George Dillard her ſecond huſband alive. That the plaintiffs are entitled, under the act of Aſſembly, to the whole eſtate real and perſonal of the ſaid Benjamin Edloe Tomlinſon, as he died an infant, and inteſtate:— But the defendant George Dilliard having obtained adminiſtration, on the eſtate of his deceaſed wife, refuſes to deliver it; and, therefore, the bill prays a decree for the eſtate.

The anſwer— Inſiſts that the mother became entitled to the ſlaves and perſonal eſtate of the in-

ſant, at his death, and, conſequently, that the defendant, as her adminiſtrator, is now entitled thereto, without being accountable to any perſon for them.

The Court of Chancery, being of opinion that the mother ſucceeded to the ſlaves and perſonal eſtate of the infant, at his death, and, conſequently, that the defendant as her adminiſtrator was entitled to them, decreed, that the bill ſhould be diſmiſſed with coſts. From which decree the plaintiffs appealed to this Court.

CALL for the Appellants— The act of Aſſembly is poſitive, that the perſonal eſtate ſhall go to the ſame perſons, who are entitled to the real eſtate. Of courſe, none can take the perſonal eſtate, but thoſe who are to ſhare the lands. Therefore, as the defendant is not entitled to any part of the lands, he has no claim to the perſonal eſtate.

WICKHAM and RANDOLPH *contra.*— By the act of 1785 there was no difficulty, for the relations on both ſides were entitled. But this the Legiſlature thought was hard in the caſe of lands only; and therefore, as to them, they altered the rule, where an infant died ſeized. But this was not intended to apply to the caſe of chattels; to which the words deſcent and purchaſe do not regularly apply; For they are continually ſubject to change; and, conſequently, the inconveniencies attending the attempt to aſcertain which of them came from his parents, and which from other ſources, are incalculable. The notion of transfering the eſtate back to the blood of the firſt purchaſer, was bottomed on the feudal ſyſtem; and therefore no longer to be regarded in this country, where that ſyſtem is now wholly exploded. It is clear, that between the years 1790, and 1792 the perſonal eſtate was not ſubject to theſe exceptions; and the act of 1792 only meant

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to incorporate the old laws, without affecting, or altering, their construction. *Brown* vs *Turberville*, in this Court,* went upon the principles contended for by us. If a contrary construction should prevail, there is no provision for the estate of a deceased infant, not derived from the father or mother.

CALL in reply. As the law is positive, the argument drawn from mere rules of construction will not be sustained; because that would be to make the law bend to the rule, and not the rule to the law. The words, *purchase* and *descent*, will not produce the difference contended for; because, if the word "*descent*," be confined in the manner mentioned, it explodes the whole system. For that word is used throughout the statute; and the word, "*purchase*," is not at all applicable to personal estate. It will not be difficult to take an account of the different estates; as the period of acquisition is short; and the will, the inventory, or deeds, will always discover it. The legislature, by the act of 1790, only intended to add to the law of descents, and meant that the statute of distribution, should refer to both. If the Legislature had intended the contrary, they would have declared so; whereas, instead of a declaration to that effect, they merely amended, that is, added to the law of descents, leaving the whole to be considered as one, and the act of distributions to refer to it, as an entire system. The proviso's operate as exceptions to the person, and not to the estate; because, the act first constituted general heirs, and then excluded some of those heirs in a particular event; leaving the rest to take the estate. In this view, the case of *Brown* vs *Turberville*, if it applies at all, is in our favour; because, the argument, that the statute would, upon our construction, be absurd and contradictory, as it would make the estate derived from the parents go differently from that derived from any

* 2 *Call.*

other ſource, applies as forcibly in the caſe of lands; becauſe it is the proviſion in the caſe of lands, which we contend for; and therefore, if the abſurdity exiſts, it is in the law, and not in our conſtruction. The ſtrongeſt argument againſt us, which has ever occurred to me, is, that both acts were to be taken as one ſyſtem. But that in fact proves nothing; becauſe they are two diſtinct acts. That of deſcents paſſed firſt, and the other afterwards, But if they had been one act, it would have amounted to the ſame thing; for the lands would have been ſubject to a particular courſe of deſcent; and then it would ſtill be a declaration that the perſonal eſtate ſhould go in the ſame manner. Under every point of view, therefore, the decree of the Court of Chancery is wrong; and ought to be reverſed.

Cur adv. vult.

ROANE Judge. In the year 1787 the Legiſlature paſſed an act, altering the courſe of deſcents. This act related only to lands, and was part of a ſyſtem commenced with a view of conforming our laws to the genius of our government, and aboliſhing the feudal and monarchical principles derived to us, therein, from the parent government of Britain. The great principle of the law was, to loſe ſight of the ſtock from whence the land deſcended (or in the feudal language, *the blood of the firſt purchaſer)* and, conſidering the perſon laſt ſeized as the abſolute owner of the land, to make that will for him, in caſe of inteſtacy, which the natural affections of mankind authorize us to infer, he would have made for himſelf: For inſtance, the deſcent was ordained to the father or the mother, in preference to collateral relations on the part of the mother or father, as the caſe may be. No perſon acquainted with the feelings of human nature can ſay, that this canon of deſcent was not conformable with the general policy of that law; none can pretend that a father or mother is, in reſpect

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of the ſon, a *ſtranger*, or that he or ſhe would not have been preferred, *by him*, to a collateral kinſman of the other line.

Thus the law ſtood as to real property; and an act of the ſame ſeſſion adopted, by reference, the ſame canons, for the diſtribution of perſonal eſtate: both laws were founded on the juſteſt and trueſt principles, which ought ever to govern the Legiſlature, until they forget that the ſon was the *owner* of the property; and that no human being is more dear to him than his father or mother.

In the year 1790, however, the deſcent law was altered, and it was enacted, that where an *infant* ſhall die, without iſſue, having title to any *real eſtate of inheritance*, derived by *purchaſe*, or *deſcent*, from the father, the mother of ſuch infant ſhould not ſucceed thereto, if there be certain relations (ſpecifying them) on the part of the father, this proviſion is reciprocated, to the caſe of land coming on the part of the mother; with a ſaving of the right of *dower*, and *curteſy*, as the caſe may be, Every perſon at all converſant with the law, will readily perceive, that the terms *real eſtate of inheritance*, *purchaſe*, *deſcent*, *dower*, and *curteſy*, are wholly inapplicable to chattels, however adapted to lands: But I will paſs on, from this argument, to others deemed of greater efficacy.

Habituated to reſpect the Legiſlature of our country, I have nevertheleſs no heſitation to ſay that this law of 1790 was anti-republican and ariſtocratic; founded on falſe principles, and on a total dereliction of the policy of the act of 1785. It was anti-republican and ariſtocratic, becauſe it tended to keep up the wealth of families; and ſo contravene the wiſe policy which annihilated intails in 1776. It was founded on falſe principles, becauſe it forgot that the infant was the *owner* of the property, and had reſpect *only* to thoſe from whom he had derived it, who had parted with the

intereſt therein, and with relation to whom, *only*, the mother or father, as the caſe may be, can be conſidered as a ſtranger, and becauſe it made a diſpoſition for the infant, which he never would have made for himſelf; and which the Legiſlature did not pretend to ſet up, for thoſe who were, themſelves, capable of diſpoſition. Tomlinſon vs Dillard.

This act of 1790, however altho the act of diſtributions was then in the particular contemplation of the Legiſlature, and in fact amended by it in another inſtance, did not extend this proviſion to the caſe of chattels; and good reaſon will preſently appear why it did not.

In 1792, the Legiſlature reviſed our laws. It was the object of that Legiſlature to ſimplify not to alter thoſe laws; and in a caſe of doubtful conſtruction, this acknowledged deſign of the Legiſlature, will be permitted to have its weight.

In this ſeſſion of 1792, an act was paſſed, to reduce into one, the ſeveral acts concerning deſcents; incorporating, among the reſt, the proviſion before ſtated, of the act of 1790; and a diſtribution law, of the ſame ſeſſion, referring to the act juſt mentioned, *by its title*, enacts that the ſurplus of chattels ſhall be *diſtributed*, to the ſame perſons, and in the ſame proportions, as lands are directed to deſcend in, by that act: And the preſent queſtion is, whether this reference adopts the canons of deſcents, as applicable to perſonal chattels, only as a *general* rule, to be varied as *other laws* on that ſubject, and the *nature of chattels* in certain inſtances may require; or eſtabliſhes them as an *univerſal rule*, for diſtributing chattels, comprehending *all caſes*, and adopting the aforeſaid proviſion, among the reſt.

The former conſtruction involves us in no difficulty whatever: The latter preſents conſequences which none can foreſee or eſtimate.

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'I adopt the former conſtruction for the following reaſons: 1ſt, Becauſe it was ſuppoſed that the Legiſlature of 1792, did not mean to extend this proviſion to chattels on account of the conſequences which would enſue, ſome of which will be now ſtated; becauſe the general deſign of that Aſſembly was not to *alter* the laws; and becauſe a miſtake probably aroſe in the preſent reſpect, by referring to the deſcent law, *by its title*, inſtead of enacting the proviſions intended, *totidem verbis*.

2d. Becauſe even an unequivocal expreſſion, by the Legiſlature, may be controuled, by conſequences, and the reaſon of the law, taken on a general view; and a *fortiori*, in a caſe of general or doubtful expreſſion.

3d. Becauſe the proviſion, as relative to the lands, is founded *only* on the idea of the party's being inteſtable, which in that caſe continues till the age of 21, whereas he is teſtable of chattels at 18: The reaſon and ground of the law, therefore, as applicable to lands, ceaſes at leaſt in part, as applying to chattels,

4th. Becauſe, altho the act is reciprocal as to lands, i. e. extends to lands deſcending from the mother, as well as from the father, yet from the nature of that property, in reſpect to the rights of the huſband, no inconvenience will enſue from ſuch extenſion; whereas, in relation to chattels, ſuch extenſion cannot exiſt without infringing the right of the huſband to take, *abſolutely*, the perſonal eſtate of his wife. If ſuch right exiſts in him, a deſcent of chattels to his wife's child, *as from her* can never exiſt. A moiety of the caſes, therefore, contemplated by the proviſion, can never take place in reſpect of chattels, without *repealing* the general law, veſting the wife's property in her huſband: A dilemma conſequently exiſts in this particular; the conſequences of which, either way, are very operative, in oppoſing the conſtruction which has obtained. If, as I clearly ſuppoſe, the

right of the husband to his wife's personal estate, cannot be affected by this provision, if it applies, (and it is here to be remarked that the husband's right is recognised in the clause immediately following) it follows, that the provision, altho reciprocal in words, is not so in fact. I will put the case of an infant dying seized of personal estate, derived from his father, and from his mother through his father, they both being dead. Now as the mother's chattels, being transferred to the father by the marriage, go to the child, *as from the father*, it follows that the relations on the part of the mother will, in every event, be excluded, and those on the part of the father, in every event, succeed. The law, therefore, is not reciprocal, but partial; and those who admit the right of the husband, and yet contend for the provision in question, must give up that part of it which favors the mother, and thereby *alter* the law, so as to operate *in all cases*, in favor of the father.

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5thly. Because, if the same rule prevails in all cases, as relative to both kinds of property, it would abridge the admitted right of aliens to take personal property, because they cannot also take lands. Besides, if the law had been enacted, *e converso*, i. e. if the canon had been established in the distribution law, and then referred to in the descent law, it might equally have been argued, that the right of aliens to take lands was enlarged or rather created. But, certainly, these important innovations, in the general law on this subject, shall not, any more than the before supposed innovation in the law affecting the husband's right to his wife's personal estate, be affected by this side-wind construction, if another rational construction can be found.

6thly. Because all laws have reference to the subject matter thereof. Land from its permanent nature, is capable of being traced ad infinitum; but chattels being of a fluctuating nature, and moreover the property of some of them consisting in their use, are not traceable, and, after a lapse

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they have explicitly declared. For the 5th ſection of the act 1792, concerning the courſe of deſcents, excludes the mother from a participation in any part of the real eſtate of her deceaſed infant, which was derived from the father; and by the act of the ſame ſeſſion, concerning the diſtribution of inteſtates eſtates, it is declared, that the perſonal property of the decedent ſhall be diſtributed in the ſame proportions, and to the ſame perſons, as lands are directed to deſcend in, and by, the firſt act. This declaration leaves no room to doubt; for it is a clear expreſſion of the Legiſlative will, that there ſhall be no diſtinction as to the perſons who are to take, whether the eſtate be real or perſonal. The court therefore, has no authority to enter into equitable inquiries, when the poſitive meaning is ſo clearly expreſſed; but it muſt reſt with the Legiſlature to correct the evil. Beſides, it is very probable, that in the courſe of ſo many years, many eſtates have been diſtributed according to the letter of the act, and that many perſons have bought and ſold and regulated their tranſactions accordingly; the miſchiefs, therefore, of a contrary conſtruction, at this time, would be incalculable. The reſult is, that I am of opinion, that the decree of the Chancellor ſhould be reverſed; and a decree entered, in its room, for diſtributing the eſtate among the complainants, according to the prayer of the bill.

LYONS Judge. The inclination of my mind would have led me to ſupport the Chancellors opinion; but the words of the act of Aſſembly, are too ſtrong to be reſiſted. I think therefore that the decree ſhould be reverſed.

PENDLETON Preſident, A teſtator, by will in 1797, deviſes to his wife a tract of land, and 7 ſlaves in fee, and other lands for life, and ſuppoſing his wife to be pregnant, gave all the reſidue of his eſtate, real and perſonal, to the child or children ſhe ſhould bring by him. The wife had a ſon who lived, about eighteen months, and then died, leaving no brother or ſiſter. The mother, intermarried with

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Dilliard, and after her death, adminiſtration on her eſtate, as well as on that of her ſon, was granted to Dilliard, who claims the perſonal eſtate of the child. The appellants are the brothers and ſiſters of the teſtator, and of courſe the next of kin to the child, by his father, and being entitled under the law of deſcents to the lands, which came from the father, claim the perſonal eſtate, under the ſame predicament by the act of diſtributions. I will conſider how the diſtribution would have ſtood before the act of 1785, what were the rights of the parties under that act, till 1792, and what is the operation of the latter act? The act of diſtribution prior to 1785, having diſpoſed of an inteſtates perſonal eſtate between his wife and children, provides for contingences happening in the family. If after the death of a father any of his children ſhall die inteſtate, without wife or children, in the lifetime of the mother, every brother and ſiſter, and the repreſentatives of them, ſhall have an equal ſhare with the mother; and if all the children ſhall ſo die inteſtate, in the life of the mother, the portion of the child dying laſt, ſhall be equally divided between the mother and the next of kin by the father; thus aſſimilating it to an executory deviſe, upon an event which muſt happen in the lifetime of the mother, in a will, which the Legiſlature are ſuppoſed to be making, to accord with what would have been the will of the inteſtate: and the effect of this law, in the preſent caſe, would have been that the perſonal eſtate would have been divided into equal moieties, one of which would have gone to the mother, and the other to the appellants. Slaves were not then included in perſonals, but deſcended to the heir, and could not, by *deſcent*, have paſſed out of the father's mily. The act of 1785 made no difference between lands and perſonals, but gave the whole of both to the mother, if there were no brothers or ſiſters of the inteſtate, to ſhare with her, and veſted the property in the firſt takers, without providing for future contingencies; or inquiry how the inteſtate

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acquired the eſtate. The law of 1790 changed the deſcent, as to lands, in the caſe of an infant inteſtate, excluding the father, and mother, from any ſhare, in the lands which came to the infant from the other parent; but this made no difference as to the perſonal eſtate, which by the act of diſtribution in 1785 was not to follow future laws of deſcent as to lands, but referred to the act of that ſeſſion by its title. Thus ſtood the law in 1792, when a new act of deſcents was paſſed, incorporating the acts of 1785, and 1790, into one; and extending the excluſion (in the caſe of an infant inteſtate) of one parent, from a ſhare of the eſtate which came from the other, to the iſſue of ſuch excluded parent, by another huſband or wife; and having paſſed that act, they proceeded to make a new act of diſtributions, copied, I believe, throughout, from the act of 1785, until they came to the reference to the law of deſcents; and that clauſe has theſe words, "If there be no wife, "then the whole of ſuch ſurplus, ſhall be diſ-"tributed *in the ſame proportion* and *to the* ſame "perſons as lands are directed to deſcend in "and by an act of the General Aſſembly, entitled "*An act to reduce into one the ſeveral acts directing* "*the courſe of deſcents;*" which is the title of the new act: This was mentioned by Mr. Randolph, to be probably a miſtake, in the reference, for which a blank had been left in the draft of the bill, referring to the title of the new act, inſtead of that of 1785, from inattention, or inaccurary in the Legiſlature. On reflection, that gentleman muſt diſcover, that this obſervation applies againſt his argument. For if the draftſman of the bill had meant to refer to the law of deſcents of 1785, he would have inſerted the title of that act; but intending to refer to the new law of deſcents, the title of which was not then fixed, he left a blank, to be filled up with ſuch title, when known: But admit the probability of ſuch miſtake, and ſtill it is poſſible, that having changed the principle as to the deſcent of lands, from that of 1785, they might

alſo mean to change it as to perſonals: ſince both were to depend upon the caſe of an infant inteſtate, and the claim to be adjuſted within a ſhort period, when it might not be ſo difficult to diſtinguiſh his ſeveral acquiſitions of property; which would be, generally, *donations* from his parents, or others; more eſpecially, in the caſe of ſlaves, an extenſive branch of perſonal property, which, as well as lands, they might intend ſhould be continued in the family of the father, in caſe there were no children; and not go into a ſtrange family. It is obſervable, that the Legiſlature has made a diſtinction between ſlaves and other perſonals, in the caſe of the widows dower; ſince, in the ſlaves, ſhe has only an eſtate for life, whilſt ſhe has a property in the other perſonals. A diſtinction which they did not think it neceſſary to make in the caſe now under conſideration; but left the leſſer to follow the greater claſs of perſonals. It reſts with the Legiſlature to explain their intentions, which I hope they will do, to ſettle the law in this important point; and, in doing ſo, I truſt, they will at leaſt allow ſome ſhare to the mother, as before 1785. If the Legiſlature are ſilent upon the ſubject, that ſilence ought to be conſidered as an approbation of the opinion of this court, and the point will be ſettled. But the words of the law, appear to me, to be too ſtrong to admit of any conſtruction by this court, as they expreſſly direct that the perſonals ſhall go to the ſame perſons as lands go to, under the new law of deſcents, adopting the excluſion in the proviſoes of that law, as well as the other parts of it. For after all, how does the intention of the legiſlature ſtand in the comparative view of theſe acts. In 1785 they declared that the lands and perſonals of an inteſtate ſhall go the ſame way; and in 1792, they have declared the ſame thing in poſitive terms, altho they altered the courſe, that both ſhould take in certain caſes, not uſing a word to diſtinguiſh one from the other. The reaſoning of the Chancellor, (relied on by the counſel in this court) drawn from the words "real eſtate of inheritance, deſcent and pur-

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chaſe," uſed in the law of deſcents, have no force upon my mind; ſince real eſtates were the only ſubject of that law, and it would have been abſurd to have uſed any expreſſions applicable to perſonals; but that application is made to the latter, by the act of diſtribution; nor do I diſcover that the whole of the ſurplus, muſt go one way under that act; ſince the whole ſurplus is diſtributed, altho part ſhall paſs to one perſon, and part to another. The caſe of *Brown* vs *Turberville* depended upon the 7th ſection of the law of deſcents, directing that "If there be no mother, nor brother, nor ſiſter, "nor their deſcendants, and the eſtate ſhall not have "been derived, either by purchaſe or deſcent, "from either the father or the mother, then the "inheritance ſhould be divided into moieties, one "of which ſhould go to the paternal, and the other "to the maternal kindred." The inteſtate in that "caſe was an *adult* perſon, and the Legiſlature "having omitted to confine it to the caſe of an in"fant inteſtate, altho it was the apparent intenti"on to refer to the former parts of the law, "which ſo confined it, the Court in conſtruction "interpoſed the words *in the case of an infant* "*intestate*, ſo as to make the clauſe read, And the "eſtate ſhall not in the caſe of an infant inteſtate "have been derived from either father or mother," to comply with the apparent intention in the law; but, in this caſe, I can diſcover nothing which ſhews an intention to exclude perſonals from the proviſo, in caſe of an infant inteſtate. The mother, therefore, is intitled to no part of the childs perſonal eſtate, which came from the father; and, in my opinion, the decree ought to be reverſed, and a decree entered for the appellants.

The decree was as follows, "The Court is of "opinion that the act of Aſſembly, paſſed in the "year 1792, for the diſtribution of inteſtates eſ"tates, having enacted that, if there be no wife "or children, the ſurplus of the perſonal eſtate "ſhall be diſtributed to the ſame perſons, and "in the ſame proportions as lands are directed

" to descend in and by an act of the General As- Tomlinson,
" sembly entitled *An act reducing into one the seve-* *vs.*
" *ral acts directing the course of descents*, has Dilliard.
" adopted the exceptions in the 5th and 6th sections of the said law of descents, which exclude
" the father and mother, and their children by
" another husband or wife, from succession to the
" lands of an infant intestate, which came to him
" from the other parent, as well as the rule to
" which they are exceptions; and extends the exclusion equally to a distributive share of the personal estate coming to the infant in the same
" manner. The words, real estate of inheritance,
" descent, and purchase used in the law of descents,
" and applicable only to lands, form no objection;
" since lands only are the subject of that act, and it
" would have been absurd to have used terms therein applicable to personals; but, in the act of distributions, the legislature have declared that personals shall go to the same persons as the lands
" are to pass to by the law of descents: Words
" too plain and positive to admit of doubt or construction: and which would be violated, in the
" present case, by the mothers taking the personal
" estate, and the lands going to the relations by
" the father; that is, such of both as came to the
" child from the father, for if he was entitled to
" any other estate of both, or either class, it will
" go wholly to the mother, and that the decree
" aforesaid is erroneous. Therefore it is decreed
" and ordered, that the same be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prose-
" cution of the appeal aforesaid here; and this
" Court proceeding to make such decree as the
" said High Conrt of Chancery should have pronounced, it is further decreed and ordered that
" the appellee deliver to the appellants all the
" slaves of the infant intestate, which came to him
" from his father, and account for their profits;
" that he also account with the appellants for the
" other personal estate which came to the intestate
" in the same manner, and pay what shall be due

"thereon; and the cauſe is remanded to the ſaid "High Court of Chancery for accounts to be tak- "en, and further proceedings to be had therein, "according to the principles of this decree."

COMMONWEALTH,

against

BEAUMARCHAIS.

A ſettlement of a public account, by the *Solicitor General*, in conſequence of an order of the Executive, did not bind the claimant; altho he receiv ed ſome payments, under the ſettlement.

An appeal lies, from the deciſion of the auditor to the courts, in all caſes.

A foreigner who came here and contracted with the government, during the paper money rage, is bound by the act eſtabliſhing the ſcale of depreciation.

The written inſtrument is, in general, to be reſorted to, in order to aſcertain, whe-

BEAUMARCHAIS appealed, from a deciſion of the Auditor of Public Accounts, to the High Court of Chancery.

The bill and petition ſtate, that in the year 1778, the plaintiff's ſhip the Fier Roderique arrived at York town, in this ſtate, with military ſtores, which were purchaſed for the ſtate, by Armſtead the ſtate agent, and refers to the contract ſigned by Armſtead and Chevallie the ſupercargo: That previous to the purchaſe of the cargo, a committee of merchants offered four dollars, ſpecie, for each dollar in the invoice, payable in bills on France, or in tobacco at 20/; but the ſupercargo preferred ſelling to the ſtate, tho not ſo advantageous. That the contract was for ſpecie; and to prevent all miſapprehenſion, a ſilver dollar was, at the time, produced to the executive by Chevallie, as explanatory of the currency, in which he expected to be paid. That in 1785, the claim was referred to the Solicitor by order of the Governor and Council, who reported £ 154,413: 19: 1 due, in money, which he reduced by the ſcale of five for one, and 973,023 lbs. tobacco. That it appears by a certificate of the Governor dated 12th of May 1780, that there was due to the plaintiff, the ſum of £ 161,603: 13: 0, with intereſt from the 1ſt of July 1778. That the plaintiff has received ſeveral payments in warrants, which have depreciated from ten to twenty five per cent. That he applied to the Legiſlature in 1793, who rejected the claim,

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altho all the facts aforesaid were proved, and admitted by the committee to be true. That, notwithstanding the premises, the Auditor refuses to settle the account, except by the scale of 5 for 1. Therefore the plaintiff prays an appeal, and that the balance in specie may be decreed to him, with interest, and reimbursement for the depreciation of the warrants.

ther the contract was for specie, or paper.

A rejection by the Legislature, of a claim against the state is no bar; but the creditor may, notwithstanding, apply to the Auditor, and, if refused, appeal to the courts.

The answer of the Auditor,—Admits the contract with Armstead, but says that a sensible depreciation was felt at the date of it, which was known to commercial men in Europe and America. That the contracting parties in this case seemed sensible of it, when the plaintiff's agent agreed to give £4, as the price of each 100 cwt. of tobacco he contracted to receive in payment; which is about four times the sum, the same quantity of tobacco could have been purchased at before the revolution, and that it could have been purchased for less than 20*s.* specie at the time of the contract. That the contract is expressed to be for Virginia currency, tho it was easy to have said *for gold or silver*, had specie been intended. That the interest was above the legal rate, which with the greater credit of the state, and the large advance in tobacco, or hopes of paper money appreciating might, have induced the plaintiff to contract. That the contract ought to be expounded as if it had been between individuals. That the defendant knows nothing of the statement relative to the silver dollar as explanatory of the contract, and calls for proof. That there was a settlement by the Solicitor, and that the Governor gave the certificate, but that it does not mention specie. That Governor Henry's certificate, afterwards, is, that it is to be discharged according to contract; which, if obtained at the plaintiff's instance, shews he so considered it himself at the time. That the plaintiff acquiesced under the report till the year 1792. That as to the loss on the warrants, if it happened at all, it

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originated from the hurry of the plaintiff to receive what the ſtate would have paid without loſs. That ſuch warrants have always been received at par by foreign creditors. That the houſe of delegates conſidered the report of the Soliçitor as proper; but if not, that the report of the committee of the houſe of delegates is no evidence.

The anſwer of the Attorney General refers to that of the Auditor, and calls for proof of the equity of the claim.

George Picket's depoſition. That in 1778 the Fier Roderique arrived at York. That the merchants of York and Williamſburg, were informed that the ſtate agent intended to buy the military ſtores, but that many goods would ſtill remain. That as ſoon as her arrival was known, merchants from Philadelphia, Baltimore, and other places, came to York to purchaſe. That they were informed that the ſupercargo offered to ſell the whole cargo which remained (after the ſtate was ſupplied) together; and that payment was to be made in ſpecie, or tobacco, at ſpecie price. That a number of merchants offered 4/6 ſpecie payable in tobacco at 20*ſ.* per cwt. for each livre, paid for the goods in France. That this offer was refuſed by the ſupercargo, becauſe he ſaid, the State Agent had offered him a better price, to wit, 6*s.* for each livre, and to take the whole cargo: Which he believed he ſhould accept. That if paper money would have been received by the ſupercargo, the merchants would have given at leaſt 20*s.* per livre, for each livre paid for the goods in France: but no ſuch offer was made, becauſe it was underſtood the ſale would be for ſpecie, or tobacco rated at 20*s.* per cwt.

The Court of Chancery was of opinion, that there was no proof of a contract for 6*s.*; but that the ſettlement with the Solicitor was not obligatory, and that the plaintiff ought to be allowed 4/6 at leaſt for each livre, according to the offer by the

merchants. Therefore that court reverſing the opinion of the Auditor, and decreeing, according to the foregoing opinion, refered it to a commiſſioner to take an account agreeable thereto. Commonw'lth vs. Beaumarchais

The report of the commiſſioner ſtates the money account of £ 154,413: 19: 1, and reduces it to livres at 4/6: after which, it ſtates the tobacco amount alſo, credits the payments, and finds a balance of £ 125,595: 2: 1¼ due.

The agreement between Armſtead and the Supercargo is for 6 *s.* for each livre which the goods coſt in France, and the public, in part pay, to deliver 1500 hhds. tobacco within 90 days at the rate of £ 4 per cwt. and 500 hhds. more at the ſame rate. The balance then remaining due to be paid in warrants bearing 6 per cent intereſt, as long as the plaintiff ſhould chuſe to let it remain there, or to be laid out for him in tobacco. The ſupercargo to deliver all the goods in the invoices ſhewn the executive except a few for his own uſe.

The High Court of Chancery decreed to the plaintiff, the ſum reported due by the commioner; and the defendants appealed to this court.

NICHOLAS Attorney General. The account was ſettled by the Solicitor, and no objection made to it until the year 1792, when a petition was preſented to the Aſſembly. This circumſtance ſhews that Beaumarchais was then ſatisfied with the ſettlement; and, that he did not conſider it as a ſpecie contract. But the Court of Chancery had no juriſdiction; for the State is ſovereign, and independent of other ſtates and nations. Therefore ſhe is not amenable either to foreign or domeſtic courts *Vatt.* 1. 138. 3 *Black, com.* 254. 1 *Dall.* 78. This argument is not anſwered by the act allowing appeals from the deciſion of the Auditors; for that relates to the appeals of citizens, and not of foreigners: and the whole complexion of the acts proves it. Again the acts of 1778, page 85,

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and the Rev. code 147, 148, ſpeak of caſes where the Auditor acts, according to his diſcretion, in diſallowing or abating any demand: But here he refuſed altogether, becauſe the Executive had decided it; and therefore the caſe does not come within the meaning of thoſe laws. The ſettlement of the Solicitor was concluſive, for the act of 1784 chap. 46, page 197, provided a fund for payment of the foreign creditors; and, under that law, the caſe was referred to him, by the Executive in the year 1785. This created a juriſdiction; which being exerciſed was concluſive; eſpecially as Beaumarchais did not apply to the Auditor, recently, and appeal, but lay bye, and received warrants, agreeable to the ſettlement: Added to all this, the Legiſlature twice rejected it; which is alſo an argument of conſiderable weight, and amounts to a bar to the claim.

But, upon the merits, Beaumarchais is not entitled; becauſe it was a paper money contract. For the State had no ſpecie in the Treaſury, and therefore a certificate of the debt, if it had been a ſpecie claim, would have been of no uſe. A circumſtance, which is concluſive to ſhow that paper money only was contemplated by the parties. This is illuſtrated by that part of the contract which was for tobacco; becauſe Beaumarchais was to be allowed the price and coſts of that to be purchaſed: which was plainly intended to meet any future depreciation, or, even, appreciation. Again, more than the uſual intereſt was to be paid; for it is ſix, inſtead of five, per cent. which looks, as if it was intended, as compenſation for the probable depreciation. Thus far upon the written agreement: but parol evidence is offered to explain it. That however is not allowable. 1 *Bro. c. c.* 92. But this caſe here is ſtronger; becauſe the parol teſtimony would go to contradict the contract in the preſent caſe: which would be contrary to all the deciſions. 1 *Call* 39, 245. If the ſituation of the country at that time be conſidered, it is not con-

ceivable that the government would have made a contract for ſpecie; becauſe paper was the only medium, and the Legiſlature had great difficulties to keep up the credit of it. *Act* 77 *page* 11. *Cb. Rev. page* 51. It is not probable, therefore, that the Executive would have made a contract, tending to ſink its credit. The offer of the merchants proves nothing; becauſe Chevallie had many inducements to prefer the ſtate; whoſe credit he thought better, and more ſecure than that of ſpeculators, and adventurers. Beſides the depreciation of paper money was as well known to him, as to the government; and therefore if ſpecie was in contemplation, why did he fail to have it inſerted, in the contract, or provided for, in ſome other way? No fraud, or impoſition, is alledged, or pretended; and therefore the preſumption is, that a man appriſed of the ſituation of the country contracted in the uſual way, as he did not make any exception. *Fonb.* 116. He probably calculated, like others, upon the advantage of his bargain, in caſe the money ſhould appreciate; for, in that caſe, he would have been entitled to the nominal ſum. 1 *Dom.* 64. 1 *Atk.* 339. 2 *Vern.* 280. Therefore Beaumarchais had no claim, but to the value of the money, according to the ſcale: This he has had; and, of courſe, nothing is due. But if any thing were due, intereſt on it, according to the decree of the Court of Chancery, is clearly not demandable; 2 *Com. Dig.* 248.—2 *Atk.* 218.—1 *Wms*, 377.—2 *Atk.* 212.—*Cas. T Talb.* 2.—2 *Vez.* 488. Theſe caſes prove, that under the circumſtances of the preſent caſe, intereſt would not be due, even if the principle were juſtly demandable; which it, certainly, is not, for the reaſons, already mentioned.

CALL *contra.* 1. The contract was for ſpecie: For *six shillings* is an equivocal term, and might relate either to *specie* or *paper* money, which creates an ambiguity; for as it may relate to either

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subject, the term is ambiguous, and altogether uncertain.

This produces two inquiries.

1. Whether parol evidence can be received to explain it?

2. Whether the evidence adduced proves it to have been a specie contract?

As to the first:

The rule is universal, that, wherever a latent ambiguity exists, parol evidence may be received, in order to explain it: As in the case of a devise to I. S. when there are two of that name; for, it being uncertain which was meant, and the words applying to both, parol evidence must be received, in order to shew which was intended.

The same reason holds in the present case; for there being two *media*, to both of which the term applies, parol evidence may be received, in order to shew which was in contemplation of the contracting parties.

The cases cited on the other side are not against us.

Ross vs. *Norvell*, 1 *Wash.* 14 is not: For there parol evidence was received; and therefore, if it proves any thing, it is a decision in our favour.—Neither does that of *Irnham* vs. *Child*, 1 *Bro.* 92. because that contained no ambiguity; and, therefore, was not within the principle. Besides that was the case of a voluntary bequest, not influenced by circumstances, and the justice due to the other contracting party.

Smith vs. *Waller* 1 *Call*, 28, affords no greater obstacle: 1st, Because the evidence there was, expressly, repugnant to the bond; which stated the money to have been received, on the day of the date; and, therefore, evidence of a receipt, at an anterior period, was contradictory to the words of

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the bond. 2d. Becauſe the Court, in that caſe, took a diſtinction between a ſuit at law, and in equity; allowing that it might be proper in equity, though not at law: and we are in a court of equity. 4d. Becauſe the court, there, expreſſed a doubt, under the laſt clauſe, and the Preſident ſtated, that there was a diverſity of opion, amongſt the Judges, upon it. 4th, Becauſe that was the caſe of a contract executed, but this, from its nature, was executory, and, in ſome meaſure, dependant upon circumſtances.

Bogle vs. *Vowles*, 1 *Call* 244, although ſomewhat ſtronger, is yet ſuſceptible of a plain anſwer. 1ſt, It was a caſe without circumſtances, and therefore it does not reſemble our caſe. 2d, It was alſo the caſe of a contract executed, and not executory: which latter circumſtance the court ſeem to have thought made a difference; for they ſay, *in the case of a bond*, the circumſtances muſt be very ſtrong to produce a departure. 3d. That caſe proves that circumſtances may controul the contract; for, in addition to what has been already obſerved, they ſay, that the circumſtances muſt be ſuch, as ariſe in the contract itſelf: which is exactly the caſe now before the court; becauſe the circumſtances all aroſe in, and were part of the contract itſelf, or were cloſely connected with it. 4th, In that caſe a new day of payment was given, which made an entire new contract; and, therefore the court obſerved, that the parties might have increaſed the ſum, on account of the depreciation. Under this idea, parol evidence of the old debt would have been wholly repugnant, and therefore was clearly inadmiſſible.

The deciſions then being out of the way, the caſe ſtands on the broad principle, which determines that a latent ambiguity may be explained by evidence *de hors* the writing. Of courſe, as ſuch an ambiguity exiſts in the preſent caſe, it is liable to the influence of parol evidence. Which there-

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fore is clearly admiſſible: eſpecially, as it was an executory contract; which it has been decided is liable to an explanation by teſtimony *aliunde*.—*Fleming* vs. *Willis*, in this court. *

As to the ſecond:

The circumſtances are external, and internal. The external are,

That Chevallie was a foreigner, unacquainted with our language, and internal affairs: He muſt therefore have dealt for ſuch money as he was acquainted with: Which was ſpecie only; for paper was unknown to his own country; and therefore paper bills would have been of no uſe there. Conſequently, if we ſuppoſe him to have been contracting with a view to advantage, we cannot preſume him to have ſold for a *medium*, which would have been of no uſe to him. Standing as he did, the only enquiry he had to make was, what proportion a Virginia ſhilling nominally bore to a French livre, ſuppoſing the *media* the ſame; and not what was the relative value of the Virginia paper ſhilling, compared to a French *ſpecie* livre. Accordingly he appears to have acted upon that principle: ſince he refuſed to deal for paper money; and when the merchants offered 4*s* 6*d* ſpecie, he rejected it, becauſe he could get more of the ſtate; which could only have been true of ſpecie, becauſe the dollar of paper money was worth leſs than the 4*s*. 6*d*. ſpecie. Another deciſive circumſtance is, that the loſs, which would otherwiſe have been ſuſtained, would have been immenſe. For the price agreed to be given, if reduced by the ſcale, would have been leſs than the *prime cost* in France; and the freight here, as the *reſolution* of the committee of the Legiſlature ſtates, was equal to the prime coſt. So that the value of the whole cargo, and more, would have been ſunk. A contract, which no man in his ſenſes, can be preſumed to have en-

* 2 *Call.*

tered into; especially, when it was in his power to have made one with the merchants, which would have been really beneficial. But this is not all; Chevallie was a mere agent for Beaumarchais, who wanted the proceeds of the cargo to make use of in France; and, as paper bills would not have answered that purpose, it cannot be presumed that he would have so far abandoned the interest of his employer, as to sacrifice his property for an article, which would have been useless to him. It cannot be presumed, that he would have faithlessly refused 4*s.* 6*d.* specie, and taken 6*s*: paper; which was not worth more than 1*s* 6*d*. This conduct could not have been justified, but would have subjected him to the action of Beaumarchais; and, therefore, if his integrity had not operated, his fears would.

So much for the external circumstances; which clearly prove that specie, and not paper, was contemplated by the parties.

The internal circumstances are, the mention of *six shillings*, instead of a *dollar*, the term then generally in use: which looks as if a distinction was intended, and that the term was understood to apply to a different *medium*, than that of the *paper dollar*. Accordingly, in all the accounts stated on both sides, the term is preserved: For Chevallie in the account stated by him, takes a distinction between the *silver of Virginia*, and the money *coined of paper in Virgina*: And when he comes to strike the balance, he does it in *silver*. Another circumstance is, that the payment was to be postponed; for the money was to remain with the state, until called for: A part of the contract which certainly never would have been made, if paper money was to have been received. 1st Because a more secure period, for returning the proceeds to France, was not likely to have happened soon, as the cargo was brought in an armed ship, which promised more than usual security. 2d Be-

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cauſe the ſtate, having plenty of paper money, would not have ſtood in need of credit. Of courſe it muſt have been poſtponed, until the ſtate ſhould be able to obtain ſpecie; which it, then, had not: for, as the paper money was already depreciated, *and rapidly depreciating*, poſtponing the payment of that *medium*, was to hazard the whole value of it.

But it is aſked, why if 6s. ſpecie was intended, and tobacco only worth 20s. ſpecie, he ſhould agree to give £4 per cwt. for tobacco? This queſtion is anſwered by another; namely, Why, if the tobacco was worth more than £4 of paper money per cwt, did the ſtate agree to take that ſum for it? The public officers were as much bound to ſave the difference to the ſtate, as Chevallie to his principal; which ſhews, that the parties had motives for it, and theſe will be explained. In the firſt place, the high price of tobacco in France, juſtified it; and, therefore, for the ſake of the whole contract, he agreed to make a ſacrifice, upon the tobacco. Chevallie was connecting and weighing the different offers which had been made him together; and by this means he found the reſult would be favourable to him. Thus 4s. 6d. was about the true value of the cargo, and 6s. above it; ſo 20s. was the true value of the tobacco, and £4 above it. But becauſe he was to get an exceſs on the price of the cargo, he could afford to give the exceſs on the price of tobacco. Of courſe, this was a mode which was agreeable to both parties. For it accommodated the ſtate, without their making an apparent diſtinction between ſpecie and paper money, ſo as to contribute to the depreciation of the latter: and it gave to Beaumarchais the value of his cargo certainly, with a proſpect of advantage from the ſales of the tobacco, in France. The propriety of theſe remarks will appear, from the following eſtimates:

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The value of 809,824 liv, at 6s. pr. livr. is £242,947 9 6
The value of 809,824 liv, at 4/6 pr. livr. is 179,817 10 1
The difference in Virginia currency is £ 63,129 19 5 to be accounted for

Which is done as follows:

The value of 2000 hhds. tobacco at £4, is £80,000 0 0
Deduct the real value, equal to 1-4, or 20/, is 20,000 0 0
Gained by the State on the Tobacco, £60,000 0 0

From £63,129 19 5
Take 60,000 0 0
Gained by Beaumarchais, by the 6/ instead of 4/6 } £3,129 19 5 Virginia currency.

And, if to this, the prospect of an advantageous sale of the tobacco in France be added, there will be found no reason to wonder, at the supercargo's contracting to allow £4, for the tobacco; because, instead of losing, he became an actual gainer thereby. As little is it to be wondered at, that the state contracted on those terms. For they lost nothing by it; as the excess of the 6s was sunk in the price of the tobacco, and they gained a credit for the specie, without discovering a distinction between the two circulating *media*, that might affect paper money; which was an object of importance to the government. Since, besides that the immediate possession of such a cargo was extremely desirable, the merchants would otherwise have bought it up, and sold it to the state, at an advanced price; or Chivallie would have gone to Congress with it; from which he had been with difficulty diverted, at first, by the pressing entreaties of the government.

But it is said that £1,300 paper money was actually received: This however proves nothing; as it was, probably, in small sums, drawn for little con-

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tingent charges for the ships use, whilst she lay in the country, and no estimate or liquidation of its value, made at the time; or, on account of its insignificance, perhaps, intended; Especially as the government, which was desirous of concealing a distinction between the two *medea* in the main contract, would scarcely have consented to acknowledge it, by adjusting too little payments.

The result is, that each party had views, in arranging the contract, upon the principles they did. For both were accommodated. The state lost nothing by the 6 s. because it was made up to them in the price of the tobacco. And Beaumarchais was to lose nothing by the tobacco: because he received it in the 6 s. with the prospect of ulterior advantages, in the sales of the tobacco.

This way the contract is intelligible, and consistent with liberal views of advantage, on both sides: But the other would be a proof of illiberality in the government, and of folly, or wickedness, or, perhaps, of both, in the supercargo. In such a case, reason dictates, that we should adopt that which is most agreeable to justice and good sense.

I conclude therefore that the evidence and circumstances clearly prove that it was a specie contract.

II. But if this was not so clear upon the evidence, and the principles of general law, it would be plain under the last clause of the scaling act;—which enacts, "that where circumstances arise "which would render a determination agreeable "to the scale unjust, the court shall award such "judgment as to them shall appear just, and equi-"table."

This necessarily introduces the parol evidence; for it gives the court jurisdiction over the circumstances. But, in order to judge of the circumstan-

ces, the court must know them: And in order to shew them to the court, parol evidence must be received.

This brings all the circumstances before the court; and then the clause of the act strictly applies.

1. Because Chevallie lost an opportunity of making a contract for specie, with the merchants; and therefore he ought not to be injured by the contract with the state. For that, in language of the act, would render the determination, according to the scale, unjust.

2. Because a settlement, by the scale, would, not only, deprive the seller of gain, but would subject him to a very heavy loss: Since he would lose more than his whole cargo.

3. Because the parties do not appear, to have contemplated depreciation at the time, and to have allowed a greater price, with that view. For Chevallie proposed to deal by his invoice, to take the prime cost and freight, with a profit, not equal to what was usually demanded. But, he will get neither costs or charges, if it be scaled; for both will be sunk: Which would be unjust, and therefore, according to the act, the contract ought to be settled by equity.

4. Because the real justice of the case is, to give what the goods might have been sold for here. Because the state ought not to have them, for less than they were worth; nor Beaumarchais to get more. This worth, was the cost and charges, with a reasonable profit: And that was actually offered by the merchants. Which decides what ought to be allowed, under the act.

5. Because the public agent made Chevallie discount the boxes of cards, which were retained, at

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four dollars for one. But that could not be juſt for the State, which would not be equally juſt for Beaumarchais: and therefore if a diſcount was made for the benefit of the ſtate, equity demands that it ſhould be for Beaumarchais likewiſe.

In fine, the court ought to conſider only what would be ſtrict moral juſtice between the parties, without regard to the technical rules of law, or even thoſe which have been adopted in a court of equity. For the act gives greater authority than a court of equity has ever exerciſed: Becauſe that court muſt follow the law; but here the court is expreſsly exempted from ſuch neceſſity, and is left to decide according to the broad principles of juſtice.

Theſe obſervations are illuſtrated, confirmed, and extended, by the deciſions which have taken place in this court. For, in the firſt place, it has been decided, That the court may inquire into the circumſtances, and from a view of them, determine whether an adherence to the ſcale would be unjuſt, and if ſo to ſubſtitute another; nay, that a jury might do it on evidence of the intention of the parties: That parol evidence would be ſufficient: and That if the contract was to be performed at a diſtant period, that was an evidence of a ſpecie contract, which would prevent the operation of the ſcale. *Watson* vs. *Alexander*, 1 *Wash.* 353,—4. But the caſe goes further, and declares, that the "contracts of men ſhould be governed by the com- "parative value of paper to ſpecie, as they under- "ſtood it, when thoſe contracts were entered into; "and, if that be more or leſs than the rate at "which the ſcale afterwards ſettled it, the latter "ought not to be a rule for them. Circumſtances "therefore tending to elucidate their ideas upon "this ſubject, collected from their expreſſions in "the treaty, the general opinion of the parties, "and of others in the neighborhood, at the time, "and ſuch like, ſeem to be what the law contemplates

"and can be only collected from parol teſtimony:" Which is a full authority, that the real juſtice of the cauſe is to be attained; and that what it is muſt be decided by the circumſtances, ſhewn by parol teſtimony.

But it has been decided, that a contract of this kind was not within the operation of the ſcale. For in *Hill*, &c. vs. *Southerland*, 1 *Wash.* 128, it was held, that imported goods were not within the act. The words of the court are: "We are "of opinion, that the legal ſcale, ſo far as it ope- "rates in the years 1777 and 1778, is not a juſt one "in itſelf, not correſponding with the general "opinion of the citizens at the time, as to depre- "ciation, *nor does the ſcale, at any period, give "a proper rule for fixing the price of imported "goods*, which was influenced by the expence and "riſk of importation, as well as by the depreciа- "tion of the paper money." Which decides the queſtion completely; and proves, that this contract being for imported goods could not be ſcaled.

III. The ſtatement by the Solicitor does not bar the claim; becauſe it was a reference by the Executive, without the conſent of the agent of Beaumarchais. It was meant as an eſtimate for the uſe of the Executive only, and was not intended to bind either party. Of courſe it has no operation.

But under another point of view this ſettlement, as it is called, does not affect the caſe; namely, that his province was not to decide upon claims, but merely to ſolicit them. He was not judge in any ſenſe, but a proſecutor altogether. And, as to the words of the act which relate to the ſums due from the public, they only mean, that they ſhould report the ballances as they appear on the public books, and not thoſe which he has decided on to be juſt. In ſhort it was like making out the eſtimates, for the ſervice of the current year.

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IV. The Court of Chancery had jurisdiction: For the terms of the 6th section are extensive enough to include every case; and expressly subject the State to the jurisdiction of the courts. The words are, "Where the Auditor acting according "to his discretion and judgment, shall disallow, "or abate any article of demand against the com- "monwealth, and any person shall think him- "self aggrieved thereby, he shall be at liberty to "petition the High Court of Chancery, or the "District Court holden in the city of Richmond, "according to the nature of his case, for redress, "and such court shall proceed to do right thereon; "and a like petition shall be allowed in all other "cases, to any person who is entitled to demand "against the commonwealth, any right in law or "equity." This clause appears to embrace every case that can be conceived; and to leave nothing for ingenuity to exert itself upon. The language of the second section, which was relied on by the attorney general, makes no difference. 1st, Because the power of government to contract, at all, originated under acts of assembly; and therefore it is within the very letter of the law. 2d, Because the latter part of the 6th section, as just observed, includes all possible cases. For there the expression is not confined to any act of the Assembly, if that were the true reading of the 2d section, but it is extended in all cases; to any person who is entitled to demand against the Commonwealth, any right *in law or equity;* Terms, than which, nothing can be more comprehensive; and therefore it would be a waste of time to discuss them.

But then it is said, that the claim is barred by the decision of the Assembly. That however is not correct; for the word *bar*, always means the decision of some arbiter between the parties: Whereas this is a refusal to pay by the debtor. Besides it is not even the decision of the whole Assembly: but only of one branch; and therefore it has no force according to the constitution; be-

cauſe both houſes muſt concur in order to give validity to any legiſlative act. Again, the Legiſlature, by refuſing to do any thing, left the caſe unaltered: And therefore if the Auditor would have been authorized, if no petition had been preſented to the Aſſembly, he was authorized afterwards. For the Legiſlature, by refuſing to make a new law, did not alter the old one.

With reſpect to intereſt, if the principal be due, intereſt is due alſo: And therefore the decree is right in that reſpect likewiſe.

HAY *contra.* The deciſion of the Auditor ought not to have been reverſed. He refuſed to enter into a new inveſtigation juſtly; becauſe the Solicitor had ſettled the account before; and therefore he had no authority to unravel it, but was bound by that ſtatement. For he is only authorized to ſettle unliquidated accounts, and not thoſe which have been adjuſted before. A contrary interpretation would convert the Auditor into an appellate judge, and would not only prevent accounts from ever being cloſed, but would totally deſtroy the effect of the act of limitations in ſuch caſes; for if no previous deſciſions are to be final, without the judgment of the Auditor, and an appeal is to lie from his ſentence, the act of limitations can never begin to run, until his deſciſion is had, ſo that no length of time will bar a claim. It follows, then, that the Auditor was correct, in refuſing to enter into a new examination, notwithſtanding the words *all other caſes* in the 6th ſection of the act of 1792, *Rev. cod.* 147; for thoſe words were plainly intended to apply to caſes, not of a pecuniary nature. The ſettlement of the Solicitor was final; and no appeal lay from his judgment. *Chanc. rev.* 133. He was directed to ſettle the accounts; the ſtate agent, and the agent for Beaumarchais were both preſent; no objection was made to the ſcale, although the agent of Beaumarchais did object to the deficiency on the tobacco;

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the account, as settled, was afterwards carried to the Executive, for their approbation; and ten years elapsed, before any application was made to the Chancellor. It is therefore too much to say, that a re-examination of accounts ought now to take place; for, if an account is not recently excepted to, it is presumed to be acquiesced in. *Atk.* 344. Which presumption ought the rather to be made, because all accounts between the state of Virginia and the United States are now closed; and, therefore, if the appellee should succeed, the State will lose the money, without any opportunity of redress, owing to the supineness of Beaumarchais, in not asserting his claim at an earlier period. The decisions of the legislature preclude all judicial enquiry. Before the year 1780, the Assembly were the only tribunal, and the jurisdiction, which was afterwards given to the courts, was concurrent only; for the word used is *may*; a term which, by no means, excludes the cognizance of the other tribunal. Besides it is universally true, that when the Legislature act within the limits of their constitutional power, no other tribunal can say that they have done wrong. In the present case it never could have been intended to give the courts power to controul the concurrent acts of the Legislature; and much less to give the party the benefit of two trials; one by the Assembly, the other by the Courts. The appellees ask of the Courts to say, that an act shall be done, which the Legislature said should not be done: which would be, to put the authority of the Court above that of the Legislature. If a judgment had been given in the case, by any other court, it would have been a clear bar to the suit in the Court of Chancery, and therefore, *a fortiori*, the decision of the Legislature ought. Otherwise more respect will be given to the acts of a Court, than to those of the Legislature; and the decisions of a Court will, in effect, repeal a law. The contract was clearly liable to be scaled. For the words shew that current money was intended; and if so it

was, neceſſarily, ſubject to the ſcale. Had ſpecie been meant, it would have been ſo expreſſed; ſuch an important ſtipulation never would have been omitted; becauſe it would have been one of the moſt eſſential parts of the bargain. But the reception of the £1300, in paper money, is deciſive; and ſhews, very clearly, that Chevallie's own idea was, that the contract was for the common currency of the country. Theſe arguments receive additional weight, when it is conſidered, that, at that time, there was no ſpecie in the treaſury, or in the country, even; and therefore is it impoſſible it ſhould have been contracted for. The government muſt have foreſeen their own inability to raiſe it; and Chevallie the total impoſſibility of their procuring it. There is nothing in the objection that the offer of the merchants would have been better; becauſe Chevallie knew nothing of them, and therefore did not care to contract with them, as not knowing whether they might be ſafely truſted. There is nothing in the caſe, then, which ought to exempt it from the operation of the ſcale; for that would be, to let the parties looſe from their contract, contrary to the intention of the act; which was only to allow a departure, where the circumſtances rendered it neceſſary. 2 *Wash.* 36, 300, 301.

WICKHAM for the appellee. It cannot be doubted that an appeal lay in this caſe from the deciſion of the Auditor; and that the Court of Chancery had juriſdiction of the cauſe, *Chan. rev.* 84. *Rev. cod.* 148. The language of thoſe acts clearly comprehend the caſe; and where the words are plain, artificial rules of conſtruction are never reſorted to. States, as well as individuals, are bound to do juſtice; but, as they may ſometimes miſtake it, there is great propriety in having a tribunal properly authorized to decide between the parties; and it was with this view that the law, allowing an appeal from the judgment of the auditor, was made; which embraces, and was intended to imbrace, every controverſy of a pecuniary nature between

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the ſtate, and an individual. The ſtatement by the Solicitor was no bar; for the act of Aſſembly,* which conſtituted him, did not mean to make his ſentence definitive. He was a mere aſſiſtant to the attorney general and other officers, but was not authorized to ſettle the claims of creditors; for that was the proper buſineſs of the Auditor. The words of the act, which relate to the ſums due from the ſtate, only meant, that the Solicitor ſhould ſend an eſtimate to the Aſſembly, in order that they might know what ſums to appropriate. In the preſent caſe the reference to him was only to enable the Executive to form ſome judgment of the anſwer they ought to give to thoſe, who applied for the money; and neither did, or was meant to, bind any body. There is no ground for the argument, that the ſettlement was acquieſced in; for it does not appear that *La til* ever ſaw the ſtatement. It was ſaid, that the deciſion of the Executive was a bar: But the firſt anſwer is, that there never was a deciſion by that body; and the next is, that the Executive had no authority to decide upon it; and conſequently no opinion of theirs could prejudice the claim. It was alſo ſaid that the deciſion of the Legiſlature precluded any further inveſtigation: But they did not act in a judicial capacity; their functions are Legiſlative only, and not Judicial: For the conſtitution has wiſely ſaid, that the Legiſlative, Executive, and Judiciary departments, ſhall be ſeparate and diſtinct; ſo that one cannot exerciſe the powers belonging to another. In a Judiciary point of view therefore, the caſe, when before the Aſſembly; was *coram non judice*. Again, the legiſlature were parties to the controverſy, and therefore could not decide it. But the words of the acts, concerning the Auditors office, put the matter beyond queſtion, for it would be abſurd to ſay, that the court might decide between the ſtate and an individual, and yet, that it could not decide againſt the pretenſions of the ſtate. Beſides if the Legiſlature could

* *Chancery rev.* 132.

exercise Judicial powers, it would be requisite that both branches should concur. But here only one of them has acted; and therefore, even under that point of view, the resolution has no operation. It it clear however that they had no Judical power, nor could they take away a vested right, by any *ex post facto* law. *Turner* vs. *Turner*'s executors, 1 *Wash.* 139. Upon principle, therefore, the resolution of the Assembly did not bar the right; and so it has been decided in this court, *The Auditor* vs. *Walton*, at the last term. The scale of depreciation does not affect the case. For Beaumarchais was a foreigner, and contracting, on equal terms, with the State; of course he was not bound by the laws of Virginia, made posterior to the contract; because not being a citizen, and dwelling abroad, he cannot be presumed to have assented to it. But the act does not appear to have contemplated the cases of the commonwealth; which are not expressly named; and as on the one hand, the commonwealth would not have been bound, by such an act, if it had been disadvantageous to her, so, on the other, she ought not to take the benefit of it, when it would be advantageous to her. It never was the intention of the Legislature that the sale of imported goods, under circumstances like the present, should be subject to the scale of depreciation; which would be too severe in its effect, where the paper money price was never arbitrary, and was always intended to bear a just relation to the actual specie price paid for them in Europe. It would therefore be very harsh to regulate them by a scale, which was intended to apply to arbitrary cases, not founded upon any such relation. That the relative price was in view, at this time, is proved by the circumstances. For Picket's deposition shews that Chevallie was offered 4/6 specie per livre; and, therefore, it is impossible to believe that he would agree to take less. The price allowed for the tobacco, does not produce the effect contended for, upon the other side: For all the parts of the contract were considered together; and ac-

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cording to that view of the case, nothing would be lost, but Beaumarchais would actually have gained a few thousand pounds: To say nothing of his prefering a contract with the State. It is not important, that specie was not expressed in the contract: Because the public would naturally wish to conceal, and not to proclaim, the depreciation. The receipt of £1300 proves nothing: It was a trifle in itself; and might have been received to pay duties, running charges, &c. If paper had been contemplated, why take credit? There was paper money enough in the Treasury, or more might easily have been emitted. The circumstances of the case forbid the operation of the scale; because the act gives power to the court to consider the intention of the parties, and the hardship of the case; and the injustice of the scale in the present instance, would be extreme: Where goods of this nature had been sent, in order to serve America, at immense expence, trouble and peril; and where the application of the scale would not leave money enough, to pay the prime cost of the articles.

RANDOLPH in reply. The Court of Chancery had no jurisdiction; because it was not one of those cases, where the Legislature intended an appeal should lie to the Courts: For the act of 1778 does not include it; and the first section of the act of 1792 only relates to cases growing out of laws or resolutions; and the sixth to cases not pecuniary. The Executive had already decided the case; and therefore the Auditor could not admit the claim, but very properly rejected it. But the decision of the Legislature, however, was conclusive; and it never could have been the intention of the law to enable the Judiciary to disregard the judgment of the Assembly. But, upon the merits, the case is in favor of the commonwealth. Beaumarchais was as much bound, by the scale, as a citizen; for, if he came here to contract, he was necessarily bound by the laws of the country. The

general currency of the country was contemplated in the agreement; for the ſtate had no ſpecie, and therefore could never have meant to contract for it. Beſides, the Executive could not, by law, have contracted for ſpecie; and public officers will not be permitted to make illegal contracts, 2 *T. rep.* 271. If ſpecie had been intended, it would have been expreſſed; and at any rate no parol evidence is to be received. *Bogle* vs *Vowles*, 1 *Call*, 244. & 1 *Wash.* 78, 352, 194, 94. *Clinch* vs *Skipwith*, in this court. The conduct of Chevallie, in receiving the £ 1300 paper money, proves, his own idea of the contract: No objection to the depreciation was made before the Solicitor, and warrants have ſince been drawn, according to that ſettlement. There is nothing, in the caſe, to exempt it, from the general operation of the law, concerning depreciation; and, therefore, the ſcale was properly applied.

Cur adv. vult.

ROANE Judge. This cauſe has been rightly conſidered as an important one: Not ſo much on account of the magnitude of the ſum in diſpute (for that is but a ſecondary conſideration with every juſt government, and no conſideration at all, with every upright judge) as on account of certain important principles involved in the diſcuſſion, and of an opinion which may have gone abroad, that the honour and juſtice of our country might be implicated. Whether, and to what extent, ſuch an opinion may really exiſt, at this time; or, from what ſource the impreſſions lately floating in the public mind, relative to this cauſe, may have been derived; whether from the incorrect allegations of intereſted parties, (which I underſtand to have been even carried into prints,) or otherwiſe, I pretend not to ſay: But certain I am, that a deciſion founded on the baſis of thoſe impreſſions, of which, as a citizen, I could not be entirely ignorant, would be very different indeed, from one

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which reſults, from a minute and critical inveſtigation of the contract, and teſtimony before us.

Many important points have been made in the diſcuſſion of this cauſe, and it has been very ably argued. If I ſhall paſs over ſome of thoſe points, in ſilence, it is becauſe I deem them unneceſſary to be decided: If I ſhall paſs over, without an anſwer, many objections which were taken, it is by no means for want of a due reſpect for the gentlemen who made them; but on account of that preſſure of buſineſs, which now, as often heretofore, compels me to give, rather a general, than a detailed opiuion, upon the caſe before me.

However unqueſtionable the claim of this commonwealth, to unabridged ſovereignty, as at the date of this contract, may be: However clear the poſition, that ſuch a ſovereignty cannot, without its conſent, be impleaded before any human tribunal; it is not at this day to be queſtioned, (and it has, accordingly, been properly conceded for the commonwealth,) that when ſuch conſent has been given, through the legiſlative organ of our government, the objection on this ſcore muſt ceaſe. The only queſtion, then, on this part of the caſe, is, whether by a fair conſtruction of the laws, a cognizance of the cauſe before us, has been yielded to this court, and in that form of proceeding which the appellee has choſen to adopt.

It has been ſaid on the part of the preſent appellee, that this foreigner, claiming the benefit of our laws, exiſting at the time of the contract, is not bound by the poſterior laws, becauſe he has never aſſented thereto: But, in fact, he has never aſſented to any of our laws; and it is not on account of ſuch aſſent, on his part, that he is bound by, or can take the benefit of, them. A better objection, on his part, would be, that the act of 1781, does not bind him, becauſe it is a retroſpective law: But even that objection would not avail; for

it is not at this day to be queſtioned, that it binds our own citizens, in whoſe favour the objection lies at leaſt with equal force. That law is indeed a retroſpective law; but one often ſanctioned by the judgment of this court; a law dictated by imperious ſtate neceſſity, and even by juſtice; its object being to give to creditors, the real value of their nominal contracts.

Putting this foreigner then on the ſame footing with our own citizens: Nay even on a better, if, in a doubtful caſe, it be proved that he were ignorant of our laws and language; if, as I am ready to admit, he is more meritorious than a citizen, in ſerving the cauſe of liberty, in a ſtrange land: He ſhall be conſidered as even a Virginia citizen, with theſe circumſtances, in an equiponderant cauſe, ready to incline the balance in his favour. This is as much as would be granted in any country under Heaven, and this the benign and liberal policy of our laws will permit.

If the contract in queſtion, is proper for judicial cognizance, it is not neceſſary that that cognizance ſhould have exiſted, at the time of its date; but the contract, conſtrued indeed as to its operation by the laws then in being, may when a tribunal ſhall afterwards ariſe, for its deciſion, be properly ſubmitted thereto. If this were not the caſe what would become of innumerable inſtances in this commonwealth of exiſting contracts being decided by newly erected tribunals? It would be impoſſible to foreſee the extent, or conſequences, of a contrary poſition. But in all the inſtances of pending improvements, in our judiciary ſyſtem, I have never heard of the objection being taken, either in the Legiſlature or elſewhere.

If this poſition be correct, the appellee, altho his contract bears a previous date, is entitled to the benefit of that clauſe of the Auditor's law of 1778, allowing an appeal; altho, as is ſuppoſed,

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the original law of 1776 has not a similar provision.

By that law, (the act of 1778,) a claimant, like the present, had a right to have his claim audited; having a claim upon the treasury for money, and the laws denying him access thereto, through any other medium, than the auditors board, except in those cases, where (which is not pretended in the present instance,) an act of Assembly shall forbid the claim to be audited.

This too was a case proper for the exercise of the Auditors discretion and judgment; for, altho there was a written contract, it was a proper subject of his inquiry, how far that contract had been complied with, how many goods had been delivered pursuant thereto, &c; to say nothing of the question which afterwards arose, and is now contested, of specie and paper money.

If then, there had been no interference on the part of the Executive, relative to this claim, no interception of the appellees regular progress to the board of Auditors, there is no doubt but that a decision against him, by that board, would create a jurisdiction in the Court of Chancery. What was the nature and effect of that Executive interference, and what its influence in the present case? For I put entirely out of the question, the decisions of the Legislature. An application to that body, for a gratuity, was proper; but for a right, under a contract; an appeal to the Judiciary, was more proper; and possibly, on that ground, the rejection by the Legislature was founded.

A settlement by the Solicitor was not the proper course for a public creditor to pursue; either as giving him access to the treasury, or as entitling his case to Judicial cognizance. Before, therefore, a conclusion shall follow, depriving a party of these privileges, and ousting our courts of their ordinary jurisdiction, it ought at least to be shewn that the

party claimant agreed to a ſubſtitution of that officer in lieu of the Auditor, and waived his right of appeal from the deciſion of the latter. But altho the Solicitor was not inveſted with the proper functions of the Auditor, he was yet an uſeful agent of the Executive, in making ſtatements relative to foreign claims, &c: There is no teſtimony in this cauſe, that the Solicitor was applied to, in the inſtance before us, in any other ſenſe than this; There is, I believe, no teſtimony, other than an ex-parte repreſentation by the Solicitor, that the agent of the appellee conſented even to this reference: But, certainly, there is no teſtimony, that both (if either) of the parties, applied to this officer as a ſubſtitute for the Auditor: Nor do I ſee that the report of the Solicitor was ever ratified by the Executive. The certificate of the Governor is merely that L. Wood was Solicitor, &c. It was his act, not that of the Council, and may be conſidered as merely a thing of courſe.

The Auditor ought not therefore, on the ground of the exiſtence of this ſettlement by the Solicitor, to have rejected the application of the appellee: But if, on the merits, his deciſion adopting in effect that of the Solicitor, was right, tho founded on an improper reaſon, that deciſion muſt be affirmed by this court.

This brings us to conſider the caſe upon its merits.

The counſel for the appellee repeatedly brings us to the deciſion of queſtions, often and often ſettled by the ſupreme tribunals of this country, and which would, if diſturbed, agitate and convulſe the commonwealth. Of this nature is the queſtion, whether the act of 1781 extends to contracts with the public. I do not conſider myſelf now at liberty to diſcuſs that queſtion, and I only notice it, to ſhew that it has not eſcaped me.

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If then this act extends to contracts with the commonwealth, as it unquestionably does, it clearly applies to the present contract, considered merely on its face and independant of other testimony. The contract is for "Virginia currency," which terms are explained, by the act of 1781, to mean paper money, as at this æra: A great part of the debt is also to be paid in tobacco at £4 per cwt. whereas the appelle now contends, that that article was then worth only twenty shillings, in specie. And further, payment was to be made, of the balance of the contract, by warrants to be drawn upon the treasury. I believe I may challenge the annals of those times, to produce a warrant drawn on the treasurer, for specie, In fact there was none amongst us, or at least none in the public treasury; and we shall not presume, without express words, that the Executive, of that day would have adopted an expedient, interdicted by law, and tending to damn the credit of that currency, which was the *sine qua non* of our liberty. These circumstances (without enumerating others) are conclusive to establish a position, which is scarcely denied, and is corroborated by all the testimony in the cause, except Mr. Picket's deposition: It is especially corroborated, by the credit given for £1300 paper money, in part of this contract. I shall therefore pass on, to that deposition, as the only evidence in the cause, which can possibly present us with a question whether, independently of the written contract itself, as on its face, it appears, either that no depreciation at all was contemplated by the contracting parties, or a different rate of depreciation, from that which results from the application of the legal scale.

As I am decidedly of opinion, for reasons to be now assigned, that this testimony, admitting its fullest force, cannot possibly vary the construction, which would be made without it, it is unnecessary to inquire, whether, and how far, parol testimony is admissible in a case similar to the present.

In this view of the depoſition, alſo, I ſhall lay no ſtreſs upon the circumſtance of its being a ſolitary one, nor on the preſumption ariſing againſt the preſent appellee, from the conſideration, that better teſtimony might probably have been obtained by him, as appears from the record: Better, I mean, not in reſpect of credibility; but from a ſuperiour opportunity of knowing the real intention of the parties, at the time of the contract. This inference is drawn, inasmuch as perſons are living, who atteſted the contract, and were preſent at its completion.

There is no deciſion in this country, which exempts a contract from the operation of the legal ſcale, upon teſtimony ſhewing a different idea in the parties, unleſs ſuch teſtimony plainly related to the time of the contract. A contrary deciſion would involve the greateſt abſurdity, ſince whatever ideas may have prevailed, at a prior time, may have been changed, and conformed to the legal ſcale, at the making of the contract. Neither is there any deciſion in this country, nor ought there to be, which varies the application of the ſcale, in conformity to the ideas of one party only: A contary idea is alſo pregnant with abſurdity and injuſtice, ſince a legal right, veſted in one, is to be deveſted by a ſecret undivulged idea, exiſting in another contracting party. Now it is remarkable, that Mr. Picket's teſtimony, not only applies to a point of time, anterior to the date of the contract, (how long before is not diſcloſed,) but relates, if at all, to the ideas of Mr. Chevallie only: It is therefore in a great meaſure, if not wholly, inapplicable to the caſe before us. If it be ſaid, that the ideas of the ſtate at a *previous* time may be inferred, from the offer of the ſtate ſtated by Mr. Chevallie, I anſwer that this is not only the allegation of a party which cannot benefit him, but relates not at all to the price of tobacco, and therefore can give no rule for eſtimating depreciation in the preſent caſe.

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But, ſuppoſing it otherwiſe, what reaſons does he aſſign. 1ſt, To ſhew that no depreciation was contemplated by the parties? or 2dly, a different rate of depreciation from that eſtabliſhed by law?

As to the firſt, he ſays, "We were informed "that the Supercargo proffered to ſell the ſurplus "of the cargo (after the State was ſupplied,) for "ſpecie, or tobacco at ſpecie price." But who gave them this information? He does not ſay that Mr. Chevallie gave it: On the contrary, it it evidently hearſay teſtimony, and as ſuch entitled to no credit. Beſides, it only applies to the ſurplus of the cargo, and if true, it does not follow, that the reſidue of the cargo might not be for ſale in paper; altho I admit that this concluſion is improbable. He further ſays, as coming from Chevallie, that the State had made him an offer of 6*s.* for each livre, for the whole cargo, which was a better offer than theirs: But he does not add, as coming from Chevallie, (nor indeed from any other,) that this 6*s.* was to be paid in ſpecie, or tobacco, at ſpecie price, altho it is ſcarcely to be believed, that that agent would have omitted to mention that circumſtance, if it had exiſted, or that the witneſs would have forgotten it. Mr. Picket indeed infers this to have been the caſe, becauſe the offer of the ſtate was ſaid to be a better offer than theirs, which he ſuppoſed could not be the caſe, unleſs that offer was in ſpecie. Whether an offer in paper money was, in fact, a better offer or not, is wholly immaterial. It is ſufficient that the agent thought ſo; and his opinion, in ſuch a caſe, might involve numerous and various conſiderations: As 1ſt, his opinion of the credit of the paper money, and its probable appreciation: 2dly, The ſuperiority of the national credit over the individual credit of theſe adventurers, or poſſibly, over any other individual credit whatſoever. 3dly, The offer of the ſtate extending to his whole cargo, whereas that of the merchants embraced the ſurplus only; and 4thly (without extending the catalogue,) his

poſſible opinion that Picket's offer, though nominally an offer of 4/6 ſpecie, per livre, was in fact an offer of leſs, for as it was to be paid in tobacco at 20 s. per cwt., it is evident that the offer would be diminiſhed in ſo far, as the tobacco was really worth leſs than the aforeſaid ſum in ſpecie: Now Mr. Picket has not proved, (nor has any other perſon,) that tobacco was really worth that price, in ſpecie, at that time.

Mr. Picket indeed ſays, that if paper money would have been received, (but he was not informed by the agent that it would not,) they would willingly have given 20 s. paper money, per livre, for the cargo: But he admits at the ſame time that the offer was not made. If it had been made, and refuſed, it might have been a ſtrong, though probably not, even then, a concluſive circumſtance, from whence to infer, Mr. Chevallie's idea that the offer of the ſtate was in ſpecie. As the offer however was never made, no poſitive inference can be drawn therefrom: It ſerves, however, plainly to ſhew an exiſting ſtate of things, at that time, which clearly refutes an idea that depreciation was not ſenſibly felt by the contracting parties. On Picket's further allegation that this offer was not made, becauſe it was generally underſtood, that no ſale would be made but for ſpecie or tobacco at ſpecie price, I will only remark, as in a former inſtance, that it is merely hearſay teſtimony.

This teſtimony then is entirely inſufficient to ſhew, that no depreciation was contemplated by the parties: How does it ſtand to ſhew that a different rate of depreciation was contemplated, from that eſtabliſhed by law? If Mr. Picket, or any other teſtimony, had ſhewn, that, at the date of the contract, tobacco was really worth 20 s. per cwt. in ſpecie; or that it was generally underſtood to be worth this; or had ſhewn any circumſtances from whence it could be fairly inferred, that both the contracting parties, conſidered this, as the

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real ſpecie value, of that article: As the contract before us, has rated the tobacco at £ 4 per cwt, in Virginia currency, it might reaſonably have been argued, that a depreciation of 4 for 1 was contemplated. But the caſe is entirely naked in all theſe reſpects, and there are no proofs, or data, from which ſuch a concluſion can poſſibly be drawn. On the contrary, the Auditor ſays in his anſwer, (and there being no conflicting teſtimony, it is immaterial to conſider, whether this allegation be evidence in the cauſe or not) "that he believes to-"bacco could have been purchaſed at the time of "the contract for leſs than 20 s. per cwt, in gold "or ſilver coin." Now if the Auditor is right, in this opinion, if an actual diminution exiſted of 4 s. from this conjectural price of 20 s. per cwt, then it is evident, that ſo far from a different rate of depreciation being inferrable, a conformity would be produced, between the ſuppoſed ideal, and the legal rate of depreciation.

If it be ſaid that Mr. Pickets offer to pay tobacco at 20 s. per cwt, might juſtly have excited an idea in Mr. Chevallie, that that was the real ſpecie value of that article, I anſwer that, as a man of buſineſs, he muſt have known that merchants generally overrate their commodities in their dealings, and eſpecially in their firſt overtures: Such an idea therefore cannot juſtly be inferred, to have ariſen, from that offer. But if it were otherwiſe, there is no teſtimony whatever, that this circumſtance was ever made known to the other contracting party, and the idea of both parties muſt concur, before the legal ſcale be departed from. Beſides whatever may have been Mr. Chevallie's opinion, at a prior time, on this ſubject, it ſhall rather be preſumed that at the time of entering into the contract, he had relinquiſhed that idea: In a ſtate of total uncertainty, and an abſolute deficiency of evidence, that preſumption ſhall rather prevail, which correſponds with, than departs from the law.

In truth, therefore, this teſtimony of Mr. Picket, is entirely too looſe, and unſatisfactory, to juſtify any departure from the written contract. We might as well at once repeal, and ſet at naught the law concerning depreciation, as to deny its application, on ſuch teſtimony as the preſent. That law (not loſing ſight of exceptions, to meet the real ideas of the parties,) was intended, and has had the effect, to prevent an infinitude of litigation; and no court in this country has power to depart from it, except in caſes excepted from the general rule therein laid down, either expreſsly in the act itſelf, or adjudged to be within the reaſon and meaning thereof, by the deciſions of the Judiciary; and it is clearly ſuppoſed, that an exception, in ſo weak a caſe as this, has never been adjudged, by any court whatever, prior to the caſe before us.

From this view, it reſults as my opinion, that the Chancellor was right in deciding, that neither by the contract itſelf, nor by any evidence in the cauſe, do the 6s. per livre, appear to have been intended by the parties to have been in ſpecie: But I differ from that Judge, in ſuppoſing, the ſettlement by the Solicitor to have been unjuſt, and in ſetting the ſame aſide, and ſubſtituting another rate of compenſation in lieu thereof: Not only, becauſe he had no power ſo to do, upon his own premiſes, becauſe the offer of the merchants, which he has made the ſtandard of the ſubſtituted compenſation, is not proved to have been, in reality, an offer of 4/6 per livre, for the reaſons already aſſigned; but becauſe, however unprofitable a bargain the appellee may have made, a circumſtance which may be regreted, but not remedied, by this court, there is no evidence in the cauſe, ſhewing injuſtice to have been done the appellee by the Solicitor's ſettlement; or, in other words, no evidence to ſhew, that that ſettlement will not yield to him, the real value, in ſpecie, of the currency contracted for, as at the time of the contract: And I cannot help here obſerving, as re-

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markable, that the Chancellor, in a contract confeſſedly for paper money, ſhould for the attainment of juſtice, as he ſuppoſed, overleap an expreſs act of the Legiſlature, when, at the ſame time, he would have conſidered himſelf inhibited, from giving a ſum, in nature of damages, if neceſſary for the attainment of the ſame object; thereby giving to a principle of deciſion, adopted by the courts, greater efficacy, than to a poſitive legiſlative act!

Admitting, then, this creditor to be highly meritorious (for even he is meritorious who combines the public good, with private emolument) and conſidering the deciſion of the Auditor, in effect, as an adoption of the Solicitor's ſettlement, though for an improper reaſon, I muſt be of opinion, that that deciſion is, ſubſtantially right, and ought not to have been reverſed by the Chancellor, but that the bill of the appellee ought to have been diſmiſſed.

FLEMING Judge. Three points were made in the argument of this cauſe.

1ſt, Whether the court has juriſdiction in the caſe?

2d, Whether the contract between William Armſtead the Agent for the commonwealth, and Chevallie the agent of Beaumarchais, was a *ſpecie*, or a *paper money*, contract?

3d, Whether, if it was a paper money contract, there are circumſtances in the caſe ſufficient to take it out of the general ſcale of depreciation, as eſtabliſhed by the act of 1781?

With reſpect to the firſt, I have no doubt. The act of 1778, eſtabliſhing the board of Auditors, is deciſive. It declares that "where the Auditors, "acting according to their diſcretion and judgment, "ſhall diſallow, or abate any article of demand

"againſt the commonwealth, and any perſon ſhall "think himſelf aggrieved thereby, he ſhall be at "liberty to petition the High Court of Chancery, "or the General Court, according to the nature "of the caſe, for redreſs; and ſuch court ſhall "proceed to do right thereon; and a like petition "ſhall be allowed in all other caſes, to any other "perſon who is entitled to demand, againſt the "commonwealth, any right in law or equity." The generality of theſe terms, which are copied into the act of 1792, embraces the preſent caſe, and leaves no room for diſpute.

But it was argued by the counſel for the commonwealth, that the act of 1780, appointing a Solicitor General, and defining his powers and duty, took the buſineſs entirely out of the hands of the Auditor; and that the reports of the Solicitor, of the 16th of December 1784, and the 6th of January 1785, are concluſive and binding upon the appellee. On recurrence to that act, however, the power will be found to fall far ſhort of this. It is, merely, "to examine from time to time, the "books of accounts kept by the board of auditors, "and to compare the ſame with their vouchers; "to ſee that all moneys to be paid by their warrants were entered and charged to the proper "accounts therefor, or to the perſons properly "charged therewith, and that the taxes levied, be "alſo credited to their reſpective and proper accounts, keeping all taxes raiſed under any one law, "ſeparate and apart from the other. To cauſe a "correct liſt of all balances due, either to or from "the public, to be ſtated, together with the amount "of the ſeveral taxes, and lay the ſame before the "General Aſſembly, at the firſt meeting of every "ſeſſion." Which certainly cannot, by fair reaſoning, be conſtrued ſo as to erect the Solicitor into a definitive arbiter, between the ſtate and the creditor. And much leſs to ſuperſede the power of the Auditors. On the contrary, he was not even authorized to ſettle and liquidate the claims

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of individuals againſt the commonwealth: His province was to examine into the regularity of the accounts, and from them to make his annual reports to the Legiſlature: Therefore he could give no definitive ſentence upon the ſubject.

From this view of the caſe, then, I am clearly of opinion that the appellee had a right to his petition of appeal from the deciſion of the Auditor, and that this court has juriſdiction of the cauſe.—Which brings me to the conſideration of the ſecond queſtion: Whether the *contract* was for *ſpecie*, or *paper money?*

The counſel for Beaumarchais laid great ſtreſs upon the riſk he run, and upon what they called his generous conduct towards the ſtate. Such arguments, if correct, ſhould have been addreſſed to another tribunal: Here they can have no weight; for his claim, according to the laws, is all that he has a right to aſk, or this court has power to award.

I view the caſe, then, preciſely, as if the contract had been made between two individuals:—And to form a correct judgment of the intention, and underſtanding of the contracting parties, ſhall refer, firſt to the writing itſelf; then to the ſubſequent conduct of thoſe concerned; and laſtly, to the evidence that has been adduced to elucidate and explain it.

The written contract ſtates, "That Mr. Che-
"vallie be allowed ſix ſhillings *Virginia currency*,
"for each *livre* which the ſaid goods and merchan-
"dize coſt in France, and in part payment there-
"for, Armſtead to deliver along-ſide of the ſaid
"ſhip at York, 1500 hogſheads of tobacco, within
"ninety days, to be reckoned from the day the
"ſaid Armſtead ſhall be notified of her arrival at
"York, at the rate of four pounds *per centum*,
"and 500 hogſheads of tobacco more, along-ſide
"any ſhip Mr. Chevallie may ſend to Alexandria,
"on Potowmack river, within ſixty days after the

" ſaid ſhip arrives at Alexandria; at the ſame rate " of four pounds *per centum:* The balance that " may be then due to Mr. Chevallie to be paid by " warrant on the treaſury of Virginia, to bear ſix " per cent. intereſt, as long as he chooſes to let it " remain there, or be laid out for him in tobacco, " for which tobacco he is to pay the coſts, and all " charges paid by our agent."

At the time of this contract, it muſt have been known to Mr. Chevallie, not only that there was no ſpecie in the treaſury, but that *paper money* was the ſole *currency of Virginia*, then, in circulation; and, from the advanced prices of every neceſſary of life, it muſt have been obvious that this currency was greatly depreciated: Of which a ſtronger evidence could not have been adduced, than that furniſhed by Chevallie himſelf, who agreed to allow £ 4 *per cwt.* for 2000 hogſheads of tobacco; when it might have been purchaſed, with ſpecie, for twenty ſhillings; or, perhaps at a lower price. But this is not all: For the whole cargo in the invoices, with a charge of fifteen livres on a box of ſhoes, coſt in France 929,700 livres; which, at ſix ſhillings the livre, amounted to £ 278,910 *Virginia currency*: Deduct the £ 36,006 for the goods retained by Chevallie, according to the contract; and £ 80,000 for 2000 hogſheads of tobacco at £ 4 per cwt. and there remained a balance of £ 158,904, due to Beaumarchais; which balance, by the contract, was to be paid in warrants on the treaſury, to carry ſix per cent intereſt, as long as Chevallie ſhould chooſe to let it lie there, or to be laid out in tobacco, at his option. Now can it be believed, that a man, extenſively engaged in mercantile affairs, ſhould have contracted for ſo large a ſum in ſpecie, to be called for at his pleaſure, as exigences might require, when he knew there was no ſpecie in our treaſury, and very little in the ſtate; or that our Executive would have been ſo extremely indiſcreet (to ſay no worſe) as to have made a

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contract for ſpecie to that amount, to be paid when demanded, at a time they neither had any, nor the means of procuring it? To me it appears to be morally impoſſible. Had ſpecie been contemplated, the inſertion of that word in the contract, was obviouſly the means of putting it out of doubt; and therefore it would not have been omitted, and *currency* ſubſtituted in its room. But there are other circumſtances, which ſerve to ſtrengthen the idea, that it was conſidered by the parties, as a *paper money* contract. For it appears both by a memorandum of Mr. Armſtead, and by an account exhibited by Chevallie, that he received in part payment for the cargo (but at what time is not ſtated) the ſum of £1300, in paper money; for which he gave credit, at the nominal amount; thereby ſhewing that paper money was contemplated. But it was ſaid by the counſel for the appellee, that this circumſtance ſhould have little weight, as the ſum (compared with the whole debt) was too trifling to be an object with Mr. Chevallie; and that he did not, at that critical period, wiſh to excite any uneaſineſs in the government, reſpecting the depreciation of our *paper money*. The argument, however, is more ſpecious than ſolid; for altho the ſum, compared with the whole contract, was not very large, yet £1300 were certainly ſufficient to have attracted the attention of a man ſituated as he was; eſpecially as, in another part of the account, he has entered the trifling *item* of 15 livres on a box of ſhoes; which diſcovers an anxious regard to the ſmalleſt ſums. Beſides it could not have eſcaped a man of his underſtanding and experience in buſineſs (had he really conſidered it as an agreement for ſpecie) that by receiving this paper money, and giving credit for it, at its nominal value, he was furniſhing a precedent that might very materially affect the whole contract, at a future day: Whereas conſidering it as a *paper money* contract, his conduct, in this reſpect, was perfectly conſiſtent with the nature of the agreement: Conſiderable ſtreſs was laid on the circumſtance of

Mr. Chevallie's being a foreigner, and unacquainted with our language; in anſwer to which it may be ſufficient to obſerve that he had interpreters with him, both of whom were witneſſes to the contract. Again, the whole of the goods (except a deficiency in ſalt, which it was agreed ſhould be ſupplied at a future day, or the price of it diſcounted) were delivered to the Commiſſary of ſtores at York, on the 1ſt of July 1778, and on the 8th of Auguſt following, Mr. Armſtead ſtated an account between Mr. Chevallie and the commonwealth, making the balance of £225.381 9 11 due to the former; of which he, on the ſame day, obtained a certificate from Mr. Henry the Governor with a *nota bene*, that the account was to be diſcharged according to the contract made with Armſtead on the 8th of June 1778. Here again we find, that nothing is ſaid about ſpecie: but this is not all. Between the date of the certificate and the 12th of May 1780, payments had been made ſo as to reduce the balance to £161,603 13, excluſive of intereſt; and Mr. Defrancy, the agent for Beaumarchais, on that day, obtained a certificate from Mr. Jefferſon, the Governor, that the above ſum with intereſt at ſix per cent per annum, from the firſt of July 1778, was due to Defrancis as agent for Mr. Beaumarchais; and that his drafts, for that amount on Mr. Armſtead, commiſſary of ſtores, would be duly honored.

Now can it be believed, that Mr. Jefferſon, in the year 1780, would have certified that Mr. Defrancy's drafts for £161,603 13 with almoſt 2 years intereſt at 6 per cent, would be duly honoured, if ſpecie had been in contemplation? Or would Mr. Defrancy have required ſuch a certificate, when they both knew there was neither any ſpecie in the treaſury, nor the leaſt proſpect of procuring any?

But the counſel for the appellee inſiſting that the term *Virginia currency*, is equivocal; have, in order to explain it, reſorted to the teſtimony of

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Mr. Picket; who says, "That a number of merchants assembled at York town, and offered the supercargo of the ship Fier Roderique, for the remainder of the goods, after the state should be supplied, at the rate of 4/6 *Virginia currency*, in specie, for each livre paid for the goods, in France, payable in tobacco at 20 s. per hundred weight, which offer was rejected by the supercargo, because he said that the agent for the state of Virginia had made him a better offer of 6 s. for each livre, and to take the whole cargo at that price. That he *believed* he should accept the offer, unless they (the merchants) would give more," But there is nothing in all this which goes to the contract itself; nor can any inference be justly drawn from it to support the idea that specie was contemplated. On the contrary, I think it may be fairly infered therefrom that Mr. Chevallie did not expect to contract with the government for specie. For when the supercargo rejected the offer of the merchants, saying that the agent for the state had made him a better one, of six shillings per livre, for the whole cargo; and that he *believed* he should accept it, unless the merchants would give more, He appears to have been hesitating which offer to accept: But if he had expected, to have received specie from the government, could he have doubted, for a moment, whether he should take six shillings the livre for his whole cargo, or 4/6 for a part of it only?

Much stress was laid, in the argument, on the loss Beaumarchais would sustain, if the contract was not considered as a specie one. But whether he made an advantageous, or an unprofitable, contract with the government, is not a proper enquiry in this court; for, here, the only question must be what the contract really was; and when that is discovered it must be adhered to. But it was probably not so disadvantageous to Beaumarchais as the appellees counsel seem to apprehend. For by agreement between the parties, Chevallie was to retain

out of the cargo, for his own uſe, ſundry ſpecified articles, which were entered on the back of the contract; and when making up his accounts in conformity thereto, he charges the whole cargo to the ſtate, agreeably, no doubt, to the invoices laid before the council board, and then gives credit for the ſeveral articles retained for his own uſe, amounting to 120,021 livres, and 9 ſous, or £ 36,006 6, Virginia currency, at 6s for each livre; which was all proper enough: But, in the account of the articles retained, there is a quantity of brandy (20 pipes and 18 barrels) ſtated to have coſt in France 12,043, liv. 10 ſous. The pipes are ſaid to contain about 125 gallons each, but no mention made of the contents of the barrels. Suppoſe them however, to have contained 33 gallons each: Then there were 3094 gallons, charged at almoſt 4 livres per gallon; which is more (I believe) than three times what the brandy actually coſt in France. And if the other articles were priced according to this example, the advance upon the prime coſt muſt have covered all his loſſes. Beſides the expedition, which he expected to derive from that part of the contract which related to the tobacco, was a great inducement.

There is no evidence then of a ſpecie contract, unleſs the ſtory of the ſilver dollar being laid on the council board, and the argument of Chevallie's being a foreigner unacquainted with our language, are entitled to any reſpect: But they have no weight, for the firſt is not proved, and the latter is no objection, as Chevallie was provided with interpreters.

I come now to conſider the third point; whether there are circumſtances in this cauſe, ſufficient to take it out of the general ſcale of depreciation, as eſtabliſhed by the act of 1781? And I think there are.

During the progreſs of paper currency, tobacco was generally reſorted to, in order to aſcertain

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the ſtate of depreciation; and twenty ſhillings per hundred, having been, for ſome years back, about the average price of that article, were generally adopted as the ſtandard. Comparing, then, thoſe circumſtances with the contract now under conſideration, in which we find £ 4 per cwt. allowed for the tobacco, it ſtrikes me very forcibly, that a depreciation of four for one was contemplated by the parties; and that they regulated their contract accordingly. But if ſo, then by the expreſs proviſion of the 5th ſection of the act, the court has power to adjuſt the contract, according to that ratio; and therefore, my opinion is, that it ſhould be ſettled by a ſcale of four for one.

It was obſerved by the counſel for the commonwealth, that the ſettlement made by the late Solicitor General, in December 1784, in which the money balance was ſcaled at five for one, ought not to be, diſturbed, as Latil, the agent of Beaumarchais acquieſced in it, and received ſundry payments under it, without complaining. But to this, it may be anſwered, that Latil was the third agent of Beaumarchais, not privy to the original contract, but ſent over here, ſix years after the debt had been due, in order to collect the large balance then unpaid: which he found attended with great difficulty and obſtructions; and therefore he was glad to receive any payments that were offered him: Beſides there is no evidence that he ever conſented to the ſettlement of the account, ſcaled at five for one; and, conſequently, his tranſactions afford no inference againſt the claim; eſpecially when it is recollected that he was not dealing with an individual, upon equal terms; but was a foreigner, juſt come to the country, contending with, and entirely in the power of, a Sovereign ſtate, as he thought; and againſt which he did not diſcover that he had any compulſory remedy. Under ſuch circumſtances I ſhould not have thought Beaumarchais himſelf, concluded, had be been here, tranſacting the buſineſs in perſon. Upon

the whole, I am of opinion that the decree of the Chancellor ought to be reverſed; that the balance of the money debt, ſhould be ſcaled at 4, inſtead of 5 for 1; and the balance of the tobacco debt at twenty, inſtead of ſixteen, ſhillings per hundred weight.

CARRINGTON Judge. That the court had juriſdiction of the cauſe is very clear, for the reaſons already given by the Judges; and therefore it is unneceſſary todiſcuſs that point any further. But upon the merits, I am of opinion that Beaumarchais was not entitled to relief. The written contract purports upon the face of it to be for the *current money* of Virginia; and therefore it is neceſſarily ſubject to the ſcale of depreciation, unleſs the appellees are able to ſhew that ſpecie was intended. But the inference appears to me to be directly otherwiſe. For in the firſt place it is not probable, that the Executive would have contracted for ſpecie, when they had none in the treaſury, nor were likely to have any. Such a conduct would have argued ſuch groſs inattention to the honor of the country, and ſuch perfidy towards the creditor, that it ought not to be attributed to them, without the cleareſt proof of the fact. But no ſuch proof is adduced. Even the ſtory of the ſilver dollar is not proved; but, if it had, the circumſtance of the total abſence of the precious metals as a circulating medium at the time, affords ſo ſtrong a preſumption that ſpecie was not intended, that ſomething more than the bare production of a ſilver dollar at the Council board ought to have been ſhewn in order to remove it; becauſe as the performance of ſuch a contract would have been ſo wholly impracticable in the then ſituation of the country, it ſeems, almoſt, impoſſible that the terms could have been accepted; and therefore where the probability is ſo great that a contract for ſpecie was refuſed, the appellees ought to have been able to ſhew not only that the ſilver dollar was produced, but that thoſe terms were accepted;

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and that the contract was for ſpecie. Inſtead of this, however, there is not the ſlighteſt proof of the allegation with regard to the ſilver dollar: and therefore it may be laid entirely out of the caſe. But there is another circumſtance which has great weight; and affords a very ſtrong inference that ſpecie was not intended. It is this, that Beaumarchais by the contract agrees to allow £ 4 per cwt. for the tobacco; altho it is ſtated, that it might have been bought for leſs than 20 s. ſpecie.

Now how can this be accounted for, upon any other ground than that the contract was for paper money? Would the ſupercargo have allowed £ 4 ſpecie per cwt. for an article that he could have bought at leſs? The thing is impoſſible. Theſe arguments are conſiderably ſtrengthened by the circumſtances which followed after the contract; ſuch as the credit of the £ 1300 at the nominal value, the certificate of the Governor to Defrancy, and the long acquieſcence under the ſolicitor's ſettlement; which all ſerve to explain the meaning of Chevallie, in the apprehenſion of all thoſe concerned with the tranſaction. But then it is ſaid that the circumſtances entitled him to relief under the 5th ſection of the act eſtabliſhing the ſcale of depreciation: ſince he rejected a better offer, in ſpecie, from the merchants, and therefore that he muſt have calculated on being paid in that medium. The only teſtimony on this point is the depoſition of Picket, taken *ex parte*, and after a great lapſe of time, when many of the circumſtances might have been forgotten, or not diſtinctly recollected.

In this ſituation of things his declarations ought to be very ſtrong indeed in order to outweigh the numerous circumſtances leading to a belief that ſpecie was not intended. But inſtead of this he does not profeſs to have been preſent when the contract was made, or to have known any thing about it. He only relates what paſſed between Chevallie and the merchants, who offered 4/6 ſpe-

cie the livre, for a part of the cargo only, to be paid in tobacco at 20s. per cwt. But does this prove that the whole cargo was not sold to government upon other terms? Certainly not; for he was not present at the contract with the state, and knew nothing about it. The price offered by the merchants forms no objection; for, as they were not known to Chevallie, he was not satisfied of their solidity, and therefore preferred a contract with the state, especially as he thereby got 6 per cent interest, whereas he must have been content with five from individuals. There is consequently no ground for the scale adopted by the Court of Chancery; and that of four for one, is equally without foundation. For it is not proved that the specie price of tobacco was 20s. per cwt. the auditor states it to have been less; and that position is fortified by the circumstances of the country. The scale of 4 for 1, therefore, which is bottomed on the notion that 20s. was the standard price of the article, cannot be sustained. Under every point of view then, it appears to me that the contract was for paper money, and that specie was not intended. The plain consequence is, that it was subject to the scale which the auditor applied, as there is nothing to distinguish it from contracts in general of the same period. My opinion therefore is that the decree of the High Court of Chancery is altogether erroneous; and that it ought to be reversed, and the bill and petition dismissed.

PENDLETON President. I do not feel my passions in the least disturbed by the objection to the juritdiction of the judiciary over this case, It is an objection of right, which I can view *in the calm lights of mild philosophy*. Indeed it cannot be supposed, that any member of this court is so fond of power, as not to have chearfully transferred this troublesome discussion to any person that would take it, if they could have done it with propriety: But we are as much bound to support the legiti-

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mate powers of the Judiciary, as that, that branch is not to invade what hath been aſſigned to the others. It was truly ſaid, by Mr. Hay, that the Legiſlative acts were uncontroulable in all things within their *conſtitutional powers*, which powers are only reſtrained by our bill of rights and conſtitution. That conſtitution creates three branches of government, and declares that their powers ſhall be kept ſeparate and diſtinct, and thoſe of one not exerciſed by the others. We muſt conſider then what are their diſtinct powers: The Legiſlature are to form rules for the conduct of the citizens, and to make regulations for the diſpoſition of property, they hold the *ſword* and the purſe, to be uſed for the purpoſe of defending the ſociety againſt foreign invaſions, or domeſtic inſurrections; and to come to the preſent purpoſe, it was to provide military ſtores and neceſſaries for the army. It is the duty of the Executive to ſee that all laws of a public nature are carried into execution; and to make contracts in caſes of the preſent nature, directed by law, and which, when made, the ſociety are bound to perform; but they cannot originate any claim upon the public. It is the province of the Judiciary to decide all queſtions which may ariſe upon the conſtruction of laws or contracts, as well between the government and individuals, as between citizen and citizen. They can neither make a *law*, or *contract;* but decide what the law is, upon any queſtion before them; and, if the Legiſlature ſhall declare the conſtruction of a law formerly paſſed, altho that declaration will operate as a law proſpectively, the judges are not bound to adopt that conſtruction in prior caſes, unleſs they approve of the ſenſe declared: And this was the opinion in the caſe of *Turner* vs. *Turner*. Upon the ſame principle, if a contract is entered into in behalf of the government purſuant to an exiſting law, and a conteſt ſhall ariſe about the meaning of the contract, it belongs to the judiciary to decide what the contract was; and, if the Legiſlature

shall decide that question, they invade the province of the judiciary, contrary to the constitution. But this is said, by one Gentleman, to be an invasion of the state sovereignty and its attributes; and by another to be a prostration of the Legislature at the feet of the Judiciary: Sounding terms! but which would have been more properly used, when the constitution was framing, in opposition to the creation of the three departments, than now, as objections to the exercise of the powers allotted to each. When the Federal Court decided, that a State was suable in any Court, besides the absurdity of applying the ordinary process to such a suit, the States were justly alarmed at the attack upon their sovereignty; which was surely invaded by calling them into a defence in any foreign court. I, as a citizen of Virginia, participated in feeling the wound; but my reflections on the subject then produced this opinion, that altho a State could not be thus called upon in a foreign court, or in its own courts, without its consent, yet the honor and justice of every State required, that an independant tribunal should be appointed within itself, to decide upon all claims against the public; and not leave them to the decision of a popular Assembly, improper from the nature of its existence, as well as from their numbers, to decide upon contracts made; that is to say, what they are, and whether they will perform them or not: And I feel a pleasure, indeed a pride, in discovering, that the Legislature of my country had provided such a tribunal, by allowing an appeal from the Auditor of public accounts, an executive officer, to the judiciary, independant in the tenure and emoluments of office, and bound to decide according to the laws, on which the contract was founded; for, in that light I view the law giving the appeal, which establishes a general mode of bringing all claims against the public before that tribunal; and the general words of the law are fully sufficient for that purpose. After all, however, the Legislature have a check upon the decision; for the court when they

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have determined in favor of the claim, can only order the Auditor to iſſue warrants upon the Treſury, but the Legiſlature muſt provide a fund to anſwer thoſe warrants, as the only means of giving the judgment effect. At the ſame time, I muſt be permitted to declare my opinion, that they would act diſhonorably, in withholding ſuch funds, unleſs in caſes of very glaring injuſtice to the State. The ſituation of England in regard to this point, has been mentioned. The petition of right was the mode adopted there for referring ſuch claims to their Judiciary; and although originally, in high prerogative times, it could not be proceeded upon, until the king had underwritten, *let juſtice be done*, yet that has long ſince been diſpenſed with, and the petition is taken up as an ordinary proceeding: That petition, and the *monſtrans de droit*, ſubjects all the claims of individuals againſt the crown, or the public, to legal deciſion: But the great caſe of the Bankers, ſhews the effect of the controuling power of the Legiſlature; for, after their claim was allowed, the Legiſlature refuſed to provide a fund, until a compromiſe took place, by which the Bankers agreed to receive a moiety of their claim. Thus much upon a ſuppoſition that the Legiſlature had rejected the legal claim of the appellee under the contract in the preſent caſe; which I do not conſider to have been the caſe. His petition to the Aſſembly ſtates his great loſs under the contract, and ſince he entered into it to ſerve the United States and Virginia, in particular, and that ſervice was eſſential to the intereſt of both; he founds his claim upon the juſtice and generoſity of the legiſlature to compenſate him for his loſs by the event of the bargain. To ſuch a claim, not a right fixed by the terms of the contract, the legiſlature only could open the public purſe. That body rejected it; and it is not for this Court to ſay, whether they acted upon proper principles, or not. For my poſition is, that all claims muſt originate with the legiſlature, or they cannot be allowed by the Executive, or Judiciary; but when, as in this

safe, the Executive are authorized by law to make a contract, and they do make it accordingly, if any dispute arises upon that contract, it belongs to the Judiciary, to decide upon it; and not to either of the other departments. Whether the Auditor acted prudently, or not, in rejecting the claim, because it had been decided upon by the Solicitor and executive, no more blame attaches upon him for his decision, than is attributable to an inferior court, whose judgments are reversed by a superior tribunal. I consider the application to him as the legal mode of bringing the question before the Judiciary. The Solicitors decision, which he thinks prohibited him from considering the claim, is referred to, and made a part of the record, and is to be examined, as if it had been his own. Upon the whole I am for overruling the objection to the jurisdiction. I proceed to consider the question upon the merits, which depends upon the written contract, and the testimony of Mr. Picket. Upon the contract, the payment of the *money part* was to be paid in *Virginia currency*, which brings it, expressly, within the 2d section of the scaling act; and the only question is, whether the circumstances disclosed in the contract itself, or arising from the testimony of the witness, brings it within the 5th section of that act?

It is objected that Beaumarchais is a foreigner, not bound by the act of 1781. But foreigners coming here and making contracts, have a right to sue in our courts for a breach of such contracts, and are bound by all laws for regulating them. And here it may be necessary to consider what those prevailing circumstances are to relate to. In all former decisions they have been confined to the single point, whether the legal scale be such as met the ideas of the parties at the time of the contract? And I think very rightly. *Hill* & *Braxton* vs. *Southerland* is no exception, since there was no contract for price. No scale had been fixed till the act of 1781; and when the Legislature were pro-

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viding one to operate upon contracts during the period of five years preceding, when the paper money had been in the progress of depreciation, and made perhaps the best general regulation which they could adopt, yet since, in those contracts, the parties might not be sensible of any depreciation at an early day, or of one different from the legal scale, this proviso justly meant to make the legal scale yield to the real contract of the parties. It is therefore to the scale that the proviso is to be applied; and not to circumstances tending to shew the motives of the parties for entering into the contract, or whether the bargain was a good or a bad one, either in prospect at the time, or in event; which would indeed be, to overturn the provision in the second clause, and open a door for endless litigation. An extreme never intended by the Legislature, and not to be adopted by this court. On the other hand, to admit of no circumstances to prove the idea of the parties, at the time, as to the state of depreciation, would be wholly to reject the proviso, which the court are equally restrained from doing. The evidence of Mr. Picket therefore, so far as it may relate to the motives which induced the agent of Mr. Beaumarchais, to prefer the contract with the government, to one with his company of merchants, have no influence upon the question; although, I cannot help observing, without intending to reflect upon the witness, that his testimony conveys a strange idea for that reference. They would accept the offer of the government, as better than the other, unless the merchants would give more; and yet no person can doubt but that 4/6 per livre, paid in tobacco at 20/ per hundred, was a better offer than 6/ per livre, paid in tobacco at £4 per cwt, at which rate a considerable proportion of the debt was to be paid by the public. The deposition can only be regarded, so far, as it may relate to the ideas of the parties as to the real depreciation; as to which, it tends to shew that their idea was, that the difference between specie and paper was four for one:

that being the difference between the price contracted to be given for tobacco, and that to be allowed the merchants on a ſpecie contract. The obſervation that Mr. Chevallie was a ſtranger, unacquainted with our laws and language, has no weight with me. Intruſted with the care of ſo large a mercantile concern, he was, no doubt, a man of underſtanding and experience in ſuch buſineſs. He was attended, in the contract, by two interpreters, and had been before ſurrounded by a company of ſpeculators; who, beſt, of any, knew the real ſtate of depreciation; and, no doubt, in the courſe of their treaty diſcovered to him what that ſtate was. For when they offered, in their propoſals, to furniſh tobacco at 20/ per hundred, in paying for the goods, he would naturally inquire why they would ſell tobacco at that price, when the country demanded for it £4 per hundred, and their anſwer muſt be as obvious, that the former was the ſpecie price, and the latter, the price in paper; which ſhews the difference to have been well underſtood. It is immaterial what were his motives to prefer a contract with the government; for it is ſufficient that this difference in the price of tobacco, conveyed to him an idea, that the depreciation was four for one, and that he contracted under that idea. That ſuch was the idea of the Executive alſo, is obvious from the ſame circumſtance; if they were acquainted with the offer of the merchants, as no doubt they were, ſince Mr. Chevallie would naturally diſcloſe it, in order to raiſe his demand upon the public; or perhaps they might fix the offer of the demand of four pounds per hundred, upon a well known cuſtom, as no ſcale was then fixed, of making the uſual price of tobacco at 20s ſpecie per hundred, compared with the current price in paper, the ſtandard by which to regulate paper contracts: To one of theſe the Executive muſt have had recourſe, when they ſettled the price to be allowed for tobacco at £4.— Which fixes the ſcale at four for one in the idea of both parties; and, in my opinion, that ought to be the ſcale, by which that contract ought to be ad-

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juſted. The Executive, in 1775, adjuſted it at 5 for 1, probably thinking themſelves bound by the legal ſcale; but as that idea has been overruled, by the opinion of this court in ſeveral caſes, the appellee has a right to have it corrected to 4 for 1, unleſs he is barred by his acquieſcence, and what has happened ſince.

It was not till 1785, that his agent diſcovered his demand was to be reduced by a ſcale of 5 for 1. The agent, as was his duty, took a copy of the ſtatement and the Governor's teſtimonial, and, no doubt, tranſmitted them to France, for his principals directions how he ſhould conduct himſelf; which he, probably, did not receive, till 1787. What thoſe were does not appear; but the agent here proceeded to receive warrants from time to time, which he could not turn into ſpecie without loſs. Thus the matter continued, till 1792, when that loſs made part of the appellees claim in his petition to the Aſſembly; at which time he diſcloſed his objection to the ſettlement, and inſiſted that it ought to be adjuſted upon the footing of a ſpecie contract. The Legiſlature directed ſome allowance to be made him on account of his loſs by the warrants, but rejected his extenſive claim. He renewed his application for the latter in 1793, but without ſucceſs; and, in April 1795, he applied to the Auditor, in order to bring the matter before the Judiciary; and, being refuſed, he filed his petition of appeal in 1796, to the High Court of Chancery. During all this period, altho he continued to receive payments that were offered him, yet he never gave a *releaſe*, or did any *act* relinquiſhing his claim, to which he was entitled by the contract; and therefore, altho the court is of opinion, in which I concur, that the contract was for paper, yet my judgment is, that we are not precluded from rectifying the miſtake in the ſettlement, which reduced the money to 5 inſtead of 4 for 1. It was objected, with a conſiderable degree of force, that, by his delay, he has depriv-

el the State of recourſe to the United States, who ought to pay the demand; but this is not concluſive in my mind, for two reaſons; firſt, that I ſuppoſe Congreſs will pay the money, becauſe I think they ought, not only upon the general principle adopted, of the war having been a common concern, but that, I believe, many of the articles purchaſed, were ſent to the continental army:—Secondly, if they ſhall refuſe, ſince the contract was made with the ſtate government, and the delay has been occaſioned by the miſtake of our Executive in adjuſting the claim under it, I think the State bound by honor and juſtice to pay the balance ariſing from a correction of that miſtake, altho they ſhould not be reimburſed by the union.

This objection had conſiderable weight in the deciſion of the caſes of the *Commonwealth* vs *Banks* and others: but there, they had neglected to have their property valued, which they claimed to be allowed for, altho laws had paſſed from time to time, directing ſuch valuation to be made; the laſt of which declared, that no ſuch claim ſhould be allowed, unleſs the valuations were made within a limited time. That this was the principle ground of deciſion, will appear from another caſe, where the claim was allowed, becauſe the property had been valued, altho there was ſome irregularity in the proceedings, not imputable to the claimant; which the court of equity ſupplied, My opinion therefore is, that the money demand ought to be reduced by a ſcale of 4 for 1, and the tobacco balance corrected from 16s. to 20s. per cwt. in order to correſpond with the ſcale. It only remains to conſider the intereſt; which, I think, ought to be allowed, from the date of the contract, in 1778, to the 6th of January 1785, and then to ſtop; ſince the agent then knew how the adjuſtment was made, and ought to have proceeded to his appeal at that time, if he meant to complain of it; but the intereſt ought to revive from the time of pronouncing the final decree, and be continued till payment.

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The Judges being thus all agreed that the decree of the Court below, as it ſtood, was erroneous, but equally divided in opinion, whether the contract ſhould be ſettled by a ſcale of 4 for 1, inſtead of the ſtatutory ſcale of 5 for 1, a decree was entered, ſtating that by the unanimous opinion of the court, the decree of the High Court of Chancery was reverſed; and, on account of the diviſion among the Judges, as to the ſcale, that no further decree could be made, as the caſe was not provided for, by the act of Aſſembly.

1803,
MAY.

At this term the Court deſired it to be argued, whether under the act of Aſſembly, relative to caſes where the Court is divided in opinion, the decree ought not to have been affirmed for the balance due according to the ſcale of four for one, agreeable to the opinion of the two judges, who thought that ſcale ought to have been adopted?

When an interlocutory decree is entered at one term of the Court of Appeals, it may be ſet aſide at a ſubſequent term.

When 4 judges only are ſitting, & they are equally divided in opinion as to a part of the decree given by the court below, the reverſal ought not to be extended farther than they all concur, there is error; but the reſidue ought to be affirmed.

CALL and WICKHAM for the appellee. The former decree ought not to have been entered.—1, Upon general principles. 2d, Upon the act of Aſſembly. With reſpect to the firſt: The Court ought never to reverſe farther down, than, a majority of the ſitting Judges concur, the Court below erred: For that is all in which it can truly be ſaid to contain error; ſince that cannot be deemed erroneous, which a majority do not pronounce to be ſo. But that which is not erroneous ought to be affirmed. For the claim is ſeparable in its nature; ſince the court have only to ſay what remains after the deduction is made, according to the opinion of the two Judges, who are for the leſſer ſum; which is all that the whole court concur in reverſing; when two think it ought not to be reverſed as to the leſſer ſum. With reſpect to the ſecond: The act plainly contemplates a partial, as well as a general, reverſal. For the object of the Legiſlature was to prevent a ſuſpenſion of the cauſe, whenever the court ſhould happen to be divided in opinion; and an adequate proviſion was

intended. But this could not be, without extending it to a diviſion in both caſes. For the difficulty of making a decree was as great, and the ſuſpenſion as certain, in the caſe of a partial, as of a total diviſion. Of courſe, if it is not within the letter, it is within the equity of the act; and the rule, in ſuch caſes, is to adopt the conſtruction, which is agreeable to the equity of the ſtatute.—*Plowd.* 467. But it is within the letter of the act: for the words, *Affirming in those cases where the voices shall be equal*, apply as well to a part, as to the whole. It follows, therefore, that the former decree ought not to have been entered.

But if ſo, the court may ſtill ſet it aſide, and enter the proper decree. Becauſe that entry was interlocutory, and the cauſe is ſtill upon the docket.

NICHOLAS and HAY, *contra*. The term having paſſed, the court cannot, now, make any alteration in the decree. But if they could, this is not a caſe contemplated by the act; which relates to caſes of a diviſion upon the whole cauſe, and not upon a part only. Beſides the Chancellor and the two Judges, who were for the leſſer ſum, did not concur; becauſe he was for allowing the whole amount, and not the leſſer ſum, only.

Cur adv. vult.

PENDLETON Preſident delivered the reſolution of the Court, as follows:

The Court have reviſed the decree of November 1801, and are unanimouſly of opinion. 1ſt, That, on the equal diviſion of the Judges in the partial affirmance of the decree, it ought to have been affirmed, as far as the two Judges thought it juſt; in like manner, as if the diviſion had been on a queſtion of a total affirmance, or reverſal.

2d, That the court are not precluded from correcting the miſtake in the former entry, ſince the

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record remains in court, and the cauſe undecided. It would ſeem ſtrange indeed that when we are conſtituted to correct the errors of other courts, we ſhould not have power to ſet right our own miſtakes, in the courſe of proceedings in a cauſe yet depending.

The following decree is, therefore, to be entered.

The court having reviſed and maturely conſidered their decree of the ſecond day of November, 1801, which left the cauſe undecided, is of opinion that the ſaid decree ought to be, as it is hereby ſet aſide, and the following ſubſtituted as the final decree of the court. The court having maturely conſidered the tranſcript of the record and the arguments of counſel, is of opinion that in the contract, ſtated in the proceedings to have been entered into between William Arſtead, as agent for the Commonwealth, and Monſieur Peter Francis Chevallie as agent for the ſaid Caron Beaumarchais, the parties having ſtipulated for the payment in Virginia currency, ſuch payment might be made in the paper money of the ſtate then in circulation, and under the ſecond ſection of the act of Aſſembly, paſſed in the year 1781, entitled, "An act directing the mode of adjuſting and ſettling the payment of certain debts and contracts," was ſubject to be reduced to ſpecie by ſome ſcale, but that under the proviſo in the 5th ſection of that act, the court is at liberty to inquire into the circumſtances tending to ſhew whether the legal ſcale, as of the period of the contract, accorded with the idea of the parties at the time, and to that inquiry alone ought the proof to be confined, and not to extend to circumſtances relative to the motives of the parties for contracting, or whether the bargain was to produce gain or loſs on either ſide, either in proſpect or event, and therefore that the decree of the High Court of Chancery rather making a new contract for the parties, than purſuing

their real contract, is founded upon wrong principles, and the quantum of the ſum decreed erroneous. And the court proceeding to conſider what decree the ſaid High Court of Chancery ſhould have pronounced, were equally divided, two judges being of opinion that the legal ſcale of five for one, by which the account was ſettled by the Executive, and according to which the ſaid Caron Beaumarchais is paid his whole demand, was the proper ſcale; and therefore that the decree and order ought to be reverſed, and the appeal from the Auditor diſmiſſed; and two other judges, of opinion that, from the contract and other teſtimony in the cauſe, it is apparent that four for one was the ſcale, or relative value between paper money and ſpecie, as contemplated and underſtood by both parties at the time of the contract, and therefore ought to be the rule of adjuſtment under the proviſo in the ſcaling act before mentioned, which would leave a balance of ſeven thouſand ſeven hundred and twenty pounds fourteen ſhillings, ſtill due to the appellees of the money part of the contract; that the price of the balance due in tobacco, ought conſequently to be changed from ſixteen ſhillings to twenty ſhillings per cent, which will add to the ſaid balance ſeven hundred and twenty pounds two ſhillings and eight pence; and that upon the aggregate of the ſaid balance intereſt ought to be allowed at ſix per centum per annum, from the 1ſt day of July 1778, to the 1ſt day of January 1785, (amounting to three thouſand two hundred and ninety one pounds eighteen ſhillings and ſixpence,) and then ceaſe, as the ſaid Caron Beaumarchais then knew of the adjuſtment, and did not complain of it at an earlier day; that the decree and order therefore ought to be affirmed as to ſo much, and be reverſed for the reſidue. The voices of the Judges being thus equal, purſuant to the act of Aſſembly in that caſe made, it is decreed and ordered that the decree and order of the ſaid High Court of Chancery be affirmed, as to the ſum of eleven thouſand ſeven hundred and thirty two pounds, fifteen ſhillings

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and two pence, part thereof, and be reverſed as to the reſidue; and that the appellees pay to the appellants, as the party ſubſtantially prevailing in this court, their coſts, expended in the proſecution of the appeal aforeſaid here.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
APRIL TERM OF THE YEAR 1802.

LATHAM,
against
LATHAM.

The heir cannot maintain an action of treſpaſs for a treſpaſs committed on the quarantine lands of the widow, before aſſignment of dower.

ROBERT LATHAM junr. brought treſpaſs againſt Robert Latham for breaking his cloſe, containing thirty acres, treading and conſuming his graſs and cutting down his trees. Plea not guilty, and the act of limitations.—Iſſue. Upon the trial of the cauſe the plaintiff filed a bill of exceptions to the courts opinion, ſtating, that the defendant moved the court to direct the jury that, in a caſe of inteſtacy, the heir could not be in poſſeſſion of any part of the tract of land on which the manſion houſe ſtood, although the ſame ſhould not be a part of the plantation, or incloſed land; & that the court directed the jury that the heir could not be in poſſeſſion until the dower was aſſigned. That the plaintiff then offered to prove the treſpaſs on certain woods, part of the tract of land on which the manſion houſe ſtood; but the court directed that no teſtimony to prove ſuch treſpaſs, during the life of the widow, could be given. Ver-

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dict and judgment for the defendant; and the plaintiff appealed to the Diſtrict Court; where the judgment of the County Court was affirmed: and, from the Judgment of affirmance, the plaintiff appealed to this Court.

WILLIAMS for the appellant. The court below erred in ſuppoſing that the heir could not maintain treſpaſs before the widows dower was aſſigned. For the act of 1705, *Old body of laws, page* 31, *Sect.* 8, only means, at moſt, ſuch lands as would be uſeful to the widow; that is to ſay, the meſſuage and cleared land: but not the wood land; as that inſtead of being uſeful would be burthenſome and expenſive. But the court interrupted the inquiry prematurely. For the parties were at iſſue upon the point whether a treſpaſs had been committed within five years or not; and therefore the plaintiff ought to have been allowed to ſhew an injury within that period. It does not appear from the bill of exceptions, but there might have been ſome agreement between the heir and widow ſo as to avoid the neceſſity of proving an aſſignment of dower; and perhaps this would have been ſhewn if the court had not abruptly put an end to the enquiry.

BROOKE *contra*. The Court merely decided on the points ſubmitted to them; that is to ſay, 1ſt, Whether the heir could enter on the quarantine lands? 2d, What was included within the quarantine? As to the firſt it is clear that at common law treſpaſs could not be maintained by the heir within the forty days, and therefore not in this country until the aſſignment of dower. As to the 2d, it ought not to be confined to the arrable land; for without the woodland, the other would be uſeleſs to her. The court will not ſuppoſe that there was any other evidence than what is ſet forth in the bill of exceptions; and therefore the caſes ſuppoſed by Mr. Williams are unimportant. The act of limitations does not admit any thing as the declaration does not ſtate the whole caſe.

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WILLIAMS in reply. The court will not presume that no other case exists than that made by the bill of exceptions; but will rather intend that the part excepted to only is stated. It is not true that the heir could not at common law maintain trespass within the forty days. The plea is entire, and the parts not separable. Of course when the defendant says he did not commit the trespass within five years; he admits he did it at some time; and the court ought to have permitted the plaintiff to prove at what time. Whereas their opinion is, that the plaintiff could not prove a trespass until the assignment of dower was established.

Cur ad vult.

LYONS Judge Delivered the resolution of the Court, that the judgment of the District Court should be affirmed.

CURRY, *against* BURNS.

Quere. Whether the court of chancery can grant a bill of review to a decree of the court of appeals, or of a county court upon new matter being discovered after the decree was made?

BURNS filed a bill in chancery, in the county court of Berkeley, stating that, on the 13th of March 1756, he obtained a warrant from the proprietors office for 400 acres of land, and paid the usual office fees. That by virtue of the said warrant, Baylis one of the proprietors surveyors, surveyed 414 acres, and returned a plat thereof to the office; for which survey and return, the plaintiff likewise paid the usual fees, and, in order to obtain a deed, was always ready and willing to pay the *composition* and other customary fees, which he actually offered to the proprietor about the month of May 1770, and demanded a deed; but the same was refused. That Curry obtained a deed from the said proprietors office for 140 acres,

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part of the ſaid 214 acres, on the 20th of Auguſt 1768; and had recovered a judgment in ejectment therefor againſt the plaintiff; who prays an injunction, and for general relief.

The anſwer of Curry denies any knowledge of the matters charged in the bill, except the grant to himſelf, and the ejectment.

A witneſs ſays, that about the year 1763, he purchaſed of Burns a ſurvey, including that in diſpute, for 400 acres, and that he reſold it to him two years afterwards. That this was before lord Fairfax advertized for his tenants to come in and ſettle, and receive their deeds. A ſecond witneſs ſworn in May 1790, ſays that upwards of 20 years before, he ſaw Burns offer Martin money, at lord Fairfax's office, and aſk him for a deed for his land; but the latter ſaid it was too late. Two other depoſitions ſtate, that, about the year 1768, Burn's made a ſimilar offer and requeſt, and that he received the ſame anſwer. There are in the record a copy of Burn's ſurvey, of 214 acres, dated the 13th of March 1756; a copy of the warrant for 400 acres, likewiſe dated the 13th of March 1756; a copy of lord Fairfax's deed to Curry, dated the 10th of September 1770; and a copy of the governor's patent to Burns for the 214 acres, dated March 1ſt 1788. The County Court perpetuated the injunction, and decreed a conveyance to the plaintiff. From which decree the defendant appealed to the High Court of Chancery; where the ſame was affirmed; and, from the decree of affirmance, the defendant appealed to this court; where both decrees were reverſed, and the bill diſmiſſed. 2 *Waſh.* 121, 6. Whereupon Burn's filed a bill of review againſt Curry and Vanmetre in the High Court of Chancery; which, reciting the ſubſtance of the former bill, adds, that it was drawn at firſt with blanks, and, through miſtake, was afterwards filled up, by his counſel, with the month of May 1770, inſtead of 1767, or 1768 the

true period; which was before Curry's title accrued. That theſe diſcoveries were made ſince the determination of the former ſuit; and that Vanmetre was a *pendente lite* purchaſer. The anſwers to the bill of review, refer to the proceedings in the former cauſe, and ſtate that the defendants do not think it probable that the dates in the bill of injunction would have been inſerted, by counſel, without the plaintiffs conſent; and that they do not admit the tender at the time ſpoken of by the plaintiff, or before Curry's title accrued.

A new witneſs ſays, That, about 1768, the plaintiff called at his houſe, and ſaid he was on his way from lord Fairfax's office, where he had been to get his deed, which he had often applied for before. That he lives two miles from the plaintiff, but had never converſed with him, about it, ſince that time. Another new witneſs ſays, that, in the ſpring of 1767, he was in company with the plaintiff, who informed him that he had been at lord Fairfax's office, and was refuſed his deed.—That he met the plaintiff on his way home from the office, and that the weather was exceſſive cold; which was the reaſon why he enquired where Burns had been. That he lives about 5 miles from the plaintiff, and has often converſed with him upon the ſubject. A third new witneſs ſays, That in March 1767 the plaintiff called at his houſe, with a led horſe, on his way to lord Fairfax's office, to get his deed. That he ſaid he meant to take Ryan* with him as a witneſs. That he lives two miles from the plaintiff, but does not recollect to have converſed with him about it ſince. A fourth new witneſs ſays, That, about the year 1767, Ryan came to her father's (the plaintiffs) houſe to borrow a horſe to bring down his mother, who lived above lord Fairfax's. That the plaintiff lent him a horſe, and went with him, ſaying that he would go to

* *The ſecond witness mentioned above, in the original suit.*

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lord Fairfax's to get his deed. That he came back in about three days, and ſaid he could not get it. That when her father ſet off it was warm, but when he returned it was cold and wet, and there was a deep ſnow. A fifth witneſs ſays he was the plaintiffs attorney in the injunction, and is ſatisfied that the blanks in the bill was filled up, and the alterations made, with his knowledge and approbation. A ſixth witneſs ſays, That after lord Fairfax advertized for thoſe who had ſurveys to come and take their deeds, he met the plaintiff, and aſked him whether he did not intend to go, and clear out his land; who anſwered, that the land was poor, and that he muſt help poor people. Two other witneſſes ſpeak as to the appearance of the dates in the bill of injunction, that they ſeemed to be written with a different pen and ink, and that there were eraſures in the bill, with the ſame kind of ink that the blanks were filled up with; which was blacker than the ink the bill was in general written with.

There is in the record of the bill of review, a copy of lord Fairfax's advertiſment for tenants to come in before the 29th of September 1766, pay their fees, and receive deeds under pain of forfeiting their rights.

The High Court of Chancery reverſed the decree entered there in conformity to the decree of the Court of Appeals; and thereupon Curry again appealed to this Court.

CALL for the appellant. The new record only exhibits the old caſe. The plaintiffs charge as to the alteration of dates in his firſt bill is plainly founded on a miſtake of the principle, which the court declared ought to regulate theſe caſes in general; and of the date which governed this particular caſe. The opinion of the court was not, that eleven years, or any other preciſe time, was the period of forfeiture, but merely, that eleven years, unaccompanied with circumſtances, was too long: That the taking advantage of the for-

feiture was the material act, which deſtroyed the right of the claimant under the former warrant. That an expreſs appropriation by ſurvey or otherwiſe was ſuch an act; and, as the ſurvey and appropriation in this caſe were ordered on the 20th of Auguſt 1768, That that ought to be conſidered as the true period when the forfeiture was to be conſidered as having been taken advantage of. Under which point of view, it was evidently unimportant, whether the alteration in the dates of the former bill, were actually made or not, altho there is great reaſon to ſuppoſe the plaintiff is miſtaken as to the fact; becauſe the court did not proceed upon thoſe dates, but upon that of the ſurvey. The true inquiry therefore is, whether the new evidence varies the caſe? The copy of the advertizement, which declares the forfeiture if not attended to; and the teſtimony of the witneſs who declares the intention of Burns to abandon, are favourable to the appellant: But the laſt evidence proves nothing new in favour of the appellee. For there are ſuch contrariety and minuteneſs in it, that the effect is deſtroyed. Beſides there are four witneſſes who ſtate the tender not to have been made ſooner than 1768, and only three, who make it to have been in 1767. But they all refer to Ryan; who ſays it was after Curry's ſurvey was directed. Beſides the new witneſſes ſtate nothing of their own knowledge; but merely the declarations made by the plaintiff himſelf. which are no evidence; and therefore the caſe is, ſubſtantially, the ſame, as it was before. But if the new teſtimony was important, there is great reaſon, from the circumſtances, to preſume it muſt have been known to the plaintiff, before the former hearing; becauſe they were all his own near neighbors, except one, who was his daughter; the ſuit was in his own county court; and it is as probable, that he who was intereſted ſhould have recollected his converſations with ſome of them, as that each of them, without intereſt, ſhould have diſtinctly remembered ſo many minute

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incidents, and separate conversations. The bill of review ought not to have been allowed by the Court of Chancery. 1st, Upon the doctrines of that court with regard to bills to review its own decrees. 2. Upon the ground that, the Court of Chancery cannot review and reverse a decree of this this court. With respect to the 1st, it is a rule that the plaintiff cannot bring a bill of review & examine witnesses, in contradiction of what he has endeavoured to establish before. 2 *Atk.* 531. But here the plaintiff offers now to establish a different date from that which he formerly contended for. Again, it is a rule, that if the new testimony goes to a matter which was in issue at the former hearing, a bill of review shall not be allowed, upon that evidence. *Hind's ch. prac.* 59.—4 *Vin. abr.* 414, 409. In which last passage, it is expresly said, that "where a matter in fact was particularly in "issue before the former hearing, though you have "new proof of that matter, upon that you shall "never have a bill of review." But here the date of the tender was in issue before, and the enquiry was directed to it expresly: Of course, the new testimony, going to the same point, will not support a bill of review. Besides the new matter ought to be such as would of itself be sufficient to be the foundation of a decree. But in the present case, the new matter would not of itself be considered as sufficient ground, whereon to afford relief. With respect to the second position, that the Court of Chancery cannot review and reverse a decree of this Court, the truth of it must be obvious. For the contrary doctrine involves this absurdity, that the inferior tribunal, whose judgments are subject to the controul of this, may impeach and annul the judgments of this Court. On principle, therefore, the Court of Coancery cannot exercise such a power. It is true that in Mitford's *pleadings in Chancery*, it is said that the Court of Chancery in England may review a decree of the House of Lords there; and, in support of that opinion, he

cites 1 *Vern.* 416. But that caſe does not maintain the poſition; for the object of the bill there was merely to enforce the diſcovery, in order, that application might be made to the Houſe of Lords; and the Chancellor only directed the defendant to anſwer, and ordered no further ſteps to be taken without leave of the Court. So that he did not decide that a bill of review would lie. Beſides the matter alledged there was entirely ſubſtantive and new; it happened after the decree, and would of itſelf have ſupported an action at law; or an original bill in equity: To which laſt it was actually aſſimilated in the argument. That authority therefore proves nothing againſt the principle contended for by us. But our poſition was expreſsly recognized and eſtabliſhed by this Court in the caſe of *White* vs. *Atkinson*, 2 *Wash.* 94. In which it was held that the Chancellor could not alter the decree of this Court.

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WILLIAMS *contra.* The Chancellor may grant a bill of review to a decree of of this court, whenever there is a new caſe made by the new teſtimony in the cauſe, as was the caſe in the preſent inſtance; and it ought to be ſo upon principle; for it would be monſtrous, if a man was to be precluded from his right, merely becauſe he had not the benefit of teſtimony, which he knew nothing of, until after the deciſion of his cauſe. Such a caſe ought to be relieved; but unleſs the Chancellor can do it, there will be a total failure of redreſs. For this court can inſtitute no proceedings for the purpoſe; and therefore the Chancery muſt, Which is not attended with the abſurdity inſiſted on, upon the other ſide; becauſe the decree of this court is remitted to the Chancery and made the decree of that court. So that, in fact, it is his own decree that he reverſes.

But there is no occaſion to reſort to that diſtinction; becauſe here is a new caſe preſented, and

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the relief is asked upon other facts than those which were decided on by this court. In which respect it differs from *White* vs. *Atkinson*; because, there, the error was in the body of the decree. The point, relative to the tender being made, was not inquired into, until it was thought important, upon the opinion of this court; and therefore an opportunity, for the investigation, ought to be allowed. The authorities are in favour of the practice. *Mitford* states it so expressly; and the case of *Needler* vs. *Kendal & Hallet*, 4 *Vin. abr.* 413, confirms his opinion. Upon the power of the Chancellor, then to grant a bill of review in cases of this kind, in general, there can be no doubt: And, if so, it was properly exercised in the present case; because the intention here is not to contradict the former case, as in 2 *Atk.* 531, but to support it; and *Hinde* and *Viner* do not oppugn the right, as the point was not regularly put in issue before.

Then upon the merits, *Pickett* vs *Dowdell.*—*Buffington* vs *Johnson*, & *Curry* vs *Burns*, 2 *Wash.* contain the general principles; but these, upon examination, will not be found to militate against us. For if the survey is the true date, still the tender was before it; and therefore the appellee can derive no benefit therefrom. The new depositions fix it in 1767: and it is no objection, that the witnesses only speak of the plaintiffs own declarations; because there being no dispute depending at this time, there was no temptation to misrepresent. There was a plain alteration of the dates in the first bill; and the witness is mistaken as to the abandonment. The advertizement could give no right to lord Fairfax; and so the court has often decided. In short there was a tender of the fees, &c. before the survey, and that, according to the opinion of the court in all the cases, was sufficient. Of course, the decree of the Court of Chancery ought to be affirmed.

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CALL in reply. In *White* vs *Atkinson*, there was not even an alteration in the decree of this court, but a mere extenſion of it, to an object, which did not appear to have been contemplated by this court. The caſe from 4 *Vin.* proves nothing, as it was, according to the ſtatement there, a mere diſmiſſion of a petition to examine witneſſes in the houſe of lords, and therefore is not like this. Beſides, by recurring to *Finch's* reports, it will be found to have been merely a bill of diſcovery, like the caſe in *Vernon*, and that the Chancellor decided nothing, as to his power to grant a bill of review. With reſpect to the inconveniences ſpoken of on the other ſide, it is true they may ſometimes exiſt, but they will be partial; and therefore ought not to outweigh the general inconvenience, on the other ſide of the Court of Chancery's perpetuating diſputes, by granting rehearings of the ſame cauſe. It is a circumſtance of ſome weight too, that no direct Britiſh caſe, allowing ſuch a bill, has been produced, or recollected by Mitford, whoſe knowledge of the doctrines of a court of equity was ſo extenſive.

Cur ad vult.

Lyons Judge delivered the reſolution of the court as follows, "The court not deciding at preſent, "whether the Court of Chancery may allow a bill "of review to reverſe a decree of this court, or the "decree of the County Court, for new matter diſ-"covered after the decree was made, or is precluded "therefrom, is of opinion, that the new teſti-"mony in this cauſe does not prove any material "fact, which was not known to the appellee be-"fore the hearing of the original cauſe in the "County Court, and that the new matter proved "by the teſtimony aforeſaid, is not ſufficient ground "for the reverſal of the former decree of this court. "That therefore the decree of the High Court of "Chancery was to be reverſed, and the bill of re-"view diſmiſſed.

OVERSTREET, *againſt* MARSHALL & others.

The Judges order for a writ of ſuperſedeas is the true commencment of the proceeding here; and therefore if that be within five years from the date of the judgment, altho the writ is not taken out till the five years have elapſed, it will be in time.

OVERSTREET obtained an order from a Judge of this court for a writ of ſuperſedeas to a judgment of the Diſtrict Court, within five years from the date of the judgment, which order he lodged with the clerk of this court; who delivered him a ſuperſedeas bond to have executed; but he being unable to obtain ſecurity before the end of five years from the date of the judgment; the clerk of this court doubted whether he could iſſue the writ of ſuperſedeas without further directions from the court.

WICKHAM & RANDOLPH for the plaintiff. One queſtion is whether the five years mentioned in the District Court law, page 88, *rev. cod.* applies to this court? But if it does, ſtill the order for the ſuperſedeas ought to be conſidered as the commencement of the ſuit here; and therefore the application ſhould relate to that period and not to the date of the writ. According to which idea the application was made in time; and then the five years are no bar.

ROANE Judge, It has been decided that the five years applies to writs of ſuperſedeas from this court, as well as from the Diſtrict Courts.* But I think the order for the writ is the true period of the commencement; and it ought to be ſo, For neceſſity requires that time ſhould be allowed for geving the bond; and accordingly in practice it is actually taken for that purpoſe. But if the order for the commencement was not to be conſidered as the true commencement of the ſuit, if the application ſhould be made but a little before the five

* *Commonwealth* vs. *Gaskins*.

years had expired, the plaintiff altho his application was seasonable might not be able to give his bond and obtain the writ before the expiration of the five years; and therefore would be barred altho he had actualy commenced his proceedings in time. I think therefore that the writ may issue now.

Overstreet, *vs* Marshall.

FLEMING Judge As the appellee has not been prevented from making his money during all this time, I think no inconvenience to him will follow from the issuing of the writ at this date. This reflection removes a considerable objection; and therefore I have the less difficulty in considering the order as the true commencement of the proceedings here.

LYONS Judge. There ought to be some restriction in these matters. A time for giving the bond ought to be fixed. But the opinion of the court is that the writ should be issued.

Writ issued.

GLASSFORD & HENDERSON,

against

HACKET Ex'r of Mickleburrough.

In a three months replevy bond, the condition ought to state that the property was retained to the use of the obligor.

The act of Assembly does not give a motion, on a three months replevy bond, against executors.

IN the year 1797, Glasford and Henderson obtained a judgment in the County Court against Hacket, as executor of Mickleburrough, upon a three months replevy bond, dated the 11th of May 1774. The bond was made payable to Glasford and Henderson, and the condition recites, that whereas the deputy sheriff had *levied an execution on the estate of Thilman for £ 97 3 1, including debt, costs, and sheriffs commissions* Now if the said Thilman and Mickleburrough should pay to Glasford and Henderson the said £ 97 3 1

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within three moths from the date, then the obligation to be void.

The Diſtrict Court reverſed the judgment; and Glaſsford and Henderſon appealed to this Court.

LYONS Judge. After ſtating the caſe delivered the reſolution of the court to the following effect: 1ſt, That the bond did not recite that the goods had been reſtored to the debtor, and therefore was not a ſtatutary bond upon which a motion could be ſuſtained. 2d; That the act of Aſſembly did not give a motion againſt executors upon ſuch bonds. Therefore *quacunque via data*, the judgment of the Diſtrict Court was right, and ought to be affirmed.

Judgment affirmed.

GATEWOOD, *againſt* BURRUS.

It is a general rule that parol evidence is not admiſſible to explain the ambiguities of a deed.

JAMES GATEWOOD brought ejectment againſt Burrus for ſome Lands; and upon the trial of the cauſe the plaintiff filed a bill of exceptions, which ſtates, that the plaintiff in ſupport of his title, introduced a deed, from the defendant Burrus and one Thompſon as executors of John Burrus, for 230 acres of land in Caroline county, on the ſouth ſide of Polecat ſwamp, "*Bounded by* "*the lines of Philip Eſtes, the ſaid James Gate-*"*wood, William Tinsley, and the above ſaid Pole-*"*cat ſwamp, &c.*" That the defendant introduced parol teſtimony to explain the ſaid deed; which was objected to by the plaintiff; but the court, being of opinion that the ſaid parol teſtimony was proper to explain what was meant by the *et cætera*, ſuffered it to go to the jury. Verdict and judgment

for the defendant; and Gatewood appealed to this Court.

Gatewood, *vs.* Burrus.

CALL for the appellant. There is a known distinction between *patent* and *latent* ambiguities. For the first may be explained by parol evidence, but not the latter. A *patent* ambiguity, is where the uncertainty and ambiguity appears upon the face of the deed: In which case it is the business of the court to expound the meaning of the words used; and therefore parol evidence cannot be resorted to for that purpose. But a *latent* ambiguity is where the deed is sensible and intelligible of itself, but there is something not appearing in the deed which renders it ambiguous, as where there is a devise to the testators son John, who has two sons of that name; in which case the will is perfect upon the face of it, and either of the sons suing for the legacy would recover, until it was shewn that there were two of that name: which circumstance would raise the ambiguity, to be explained by parol evidence. 8 *Co.* 155. *a.* Hence it follows that parol testimony can never be received to explain the *intention;* because that is to be collected from the words: And of the meaning of these, it is the province of the court to judge. So that parol evidence is never allowed to explain an ambiguous expression; for if it is capable of interpretation, the Judge should do it from the words; and if it be not intelligible, but is altogether uncertain, the disposition is, so far, void. In the present case, the ambiguity is patent; for it is in the expression: which, if uncertain, is void, and not the subject of explanation, according to 8 *Co. ubi supra.* In short, it may be considered as the general common law principle, that parol evidence is not to be received in explanation of the words of a deed, which are to be construed by the expression itself, and not by evidence. 3 *Wils.* 275. 2 *Black.* 1250. To which may be added, that a departure from this rule would destroy the statute of frauds altogether; and would introduce all the

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uncertainty which that law was intended to guard againſt.

BROOK *contra.* It is clear that parol evidence may be received to explain a *latent* ambiguity.—*Lord Bacon's maxim* 23; and here the ambiguity was latent: For the *et cætera* is uncertain and therefore ſhould be explained. The evidence was intended merely to explain a boundary, the courſe of which was latent, and did not appear in the deed. The plaintiff could not have aſcertained the extent of his own demand without ſuch evidence; and therefore the defendant was clearly entitled to introduce it; for the right muſt be reciprocal. *Brown Chan. cas.* 84, 472. There is a paſſage in 2 *Bac.* 654, which proves that the party may introduce parol evidence to ſhew that a particular thing was a parcel of that ground; and the ſame idea is ſupported in 1 *Term Rep.* 701. So if there be a deed for £ 10 and other conſiderations, thoſe other conſiderations may be ſhewn in evidence. The caſes cited on the other ſide do not apply, for they were caſes of evidence to contradict the deed. The plaintiffs could not even have made a ſurvey of their lands without the aid of parol evidence, on account of the uncertainty in the deſcription. There was a caſe in this court of *Willis* * & ſomebody, which went much greater lengths than we contend for, as a whole farm was included by the parol evidence.

RANDOLPH in reply. The general rule is that parol evidence cannot be received to explain a deed: And, if this caſe differed from the ordinary caſes ſo as to entitle the defendant to uſe the parol evidence, it ought to have been ſhewn in the bill of exceptions *Claiborne* vs. *Pariſh.*—2 *Wash.* 146.

ROANE Judge. The counſel for the appellant were miſtaken in ſuppoſing that the court had

* *Fleming* vs *Willis.* 2 Call.

decided, as a general propoſition, that parol evidence was admiſſible to explain a deed; for the bill of exceptions ſhews, that the deciſion was applied to the *et cætera* ſtated in the deed; and therefore it becomes a queſtion whether a relaxation from the general rule in this particular inſtance, be admiſſible? Gatewood, *vs.* Burrus.

If, as was argued by the appellees counſel, this *et cætera* had not extended to the conveying part of the deed, but only to that which is deſcriptive, I will not ſay but that a different deciſion might be given. But he is miſtaken in the fact, for the conveying parts of the deed extended to *all the land* contemplated in the deſcriptive part. An attentive peruſal to the deed itſelf will make this more manifeſt than any thing I can ſay to prove it. The enquiry is, whether parol evidence be admiſſible to abridge or enlarge the quantity of land claimed under the deed? It is not material for us to ſay, whether the plaintiff is entitled to recover on his deed without an explanation or ſupplement. He does not come forward, with a view to either himſelf, but is willing to abide by a conſtruction as upon the deed itſelf. It is in oppoſition to that conſtruction that the evidence in queſtion was exhibited by the defendant.

That evidence tended either to ſupply or to explain the deed in a material point. If to ſupply it, it runs directly in the teeth of the law requiring ſuch agreements to be in writing. If to explain it, it follows, that as the words in queſtion have in themſelves no determinate ſignification, as applied to the preſent deed, but only by reference to ſomething elſe, which is not therein inſerted, it may be that evidence upon this point might contradict the meaning of the words, as conſtrued upon the face of the deed itſelf.

In ſo plain a caſe as this, it is unneceſſary to examine minutely, or to quote many authorities.

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I beg leave however to refer to the cases of *Baylis* vs *the Attorney General*, 2 *Atk* 240, and *Partericke* vs *Powlet*, 2 *Atk*. 384 as analagous to the case before us, and supporting my present opinion.

For these reasons I think the judgment of the District Court should be reversed, and a new trial granted, with a direction that the evidence, now under consideration, should not be admitted upon such new trial.

I have looked into the case of *Fleming* vs *Willis* which was mentioned, as probably having an influence upon this; but that case is distinguishable from the case before us. 1st, As being a variance between a marriage settlement and the original agreement; in which case considerable liberality has been exercised in controuling the settlement by the agreement: and 2d, Because there the variance at the time of the settlement being made, was discovered, and would have been rectified, had not the grantor declared, that there was no occasion for an alteration, for that the deed was meant to operate according to the contract; and it would have been sanctioning a fraud, in such a case, not to have adhered to the terms of the original agreement. That case therefore has no influence upon the present.

FLEMING Judge. The general rule is, that parol evidence cannot be received to explain the ambiguities of a deed or written agreement. There are some few exceptions, as in the case of a latent ambiguity: But then the person offering the evidence ought to shew that his case is within the exceptions.

In the present case, the evidence was admitted to explain what was meant by an *et cætera* in the deed; but the evidence is not stated in the record, so as to afford the court an opportunity of determining whether it was admissible or not. For

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aught that appears to the contrary, it might have gone to explain away the whole effect of the deed, in oppoſition to the rule, that where there is an ambiguity, or an uncertain expreſſion in a deed, it ſhall be conſtrued in favour of him for whoſe benefit the deed was made. As nothing therefore appears to take it out of the influence of the rule which forbids the intoduction of parol evidence in general, the rule muſt be adhered to. For theſe reaſons I am for reverſing the judgment and awarding a new trial, at which the defendant will have an opportunity of ſtating his evidence, ſo as to enable the court to decide whether it was admiſſible or not.

LYONS Judge. The judgment of the court is to be as follows: "The court is of opinion that "the ſaid judgment is erroneous in this, that the "parol teſtimony, admitted by the court to go to "the jury to explain the deed in the proceedings "mentioned, and excepted to, is not fully ſet forth "in the bill of exceptions, as it ought to have been "for this court to decide on, before the ſaid bill "was received, or ſigned, and ſealed by the Judg-"es; therefore it is conſidered that the ſaid Judg-"ment be reverſed and annulled, and that the ap-"pellant recover againſt the appellee his coſts by "him expended in the proſecution of his appeal "aforeſaid here: And it is ordered that the jurors "verdict be ſet aſide, and that a new trial be had "between the parties."

TAYLOR,
against
ARMSTEAD.

ARMSTEAD moved againſt Taylor for money received by him as attorney for the plaintiff. The Diſtrict Court gave judgment for the ſum received, with 15 per cent intereſt until paid. From which judgment Taylor appealed to this court.

The 15 per ct. damages are not recoverable againſt an attorney, who receives the money of his client, and fails to pay it to him.

RANDOLPH for the appellant. This being a ſummary remedy, introduced by a ſtatute, the ſtatute is to be ſtrictly obſerved. But the act does not give a motion on the bare *receipt* of the money without a *refuſal* to pay. The plaintiff therefore, in order to ſupport his motion, ought to have ſhewn a refuſal. This was more neceſſary, if the 15 per cent damages were recoverable; for then the day of *refuſal* became important, in order to aſcertain when the damages ſhould commence. But the act did not intend to ſubject the attorney to 15 per cent damages; for the words are only, that he "ſhall be proceeded againſt in a ſummary "way, in the ſame *manner* as ſheriffs are liable to "be proceeded againſt for money received on ex-"ecutions," wi hout declaring that he ſhall be liable to any penalty: So that the word *manner* relates, merely, to the mode of recovering the money received, and is not intended to create any penalty for the default.

HAY for the appellee. The notice was a demand and refuſal; and therefore ſatisfied the act, in that reſpect. As to the damages, they are to be awarded from the time the money ought to be paid; and, as that could only be aſcertained in the court which rendered the judgment, this court will preſume that it was properly eſtabliſhed there, nothing appearing to the contrary.

Taylor, *vs* Armstead.

RANDOLPH in reply. The notice was not a demand and *refusal*, within the meaning of the act, which contemplates an actual demand of payment: But this was merely notice for judgment and a refusal, which, for any thing that appears never existed; and it is not given by the client, in person, or by any body authorised to demand and receive payment. It ought to appear, in the judgment, that there was a refusal, and at what time, in order that the court might judge, when the damages, if demandable, accrued.

Cur adv. vult.

LYONS Judge Delivered the resolution of the court, to the following effect: That as to the first point relative to the demand and refusal, there was no room for exception upon that ground; because the defendant, by appearing and contesting the claim, had rendered it unnecessary, that further proof, with regard thereto, should be stated in the record. But with respect to the second point, relative to the damages, the court was clearly of opinion that the judgment was erroneous; for the 15 per cent damages are not given against an attorney by the act of Assembly, which merely relates to the notice and mode of conducting the cause, but does not create a penalty.—That, therefore, the judgment of the District Court was to be reversed, and judgment entered for the debt only.

AUSTIN, *against* RICHARDSON.

What averments are sufficient in a declaration.

RICHARDSON, executor of Richardson, brought an action on the case against Austin, and declared, That whereas Winston was indebted to the plaintiffs testator in the sum of——, and

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2 *Wash.* Besides, there is an expres averment that the plaintiff had performed all things on his part to be performed, which includes notice, if it were necessary; so that, after verdict, it will be presumed to have been proved; which is a complete answer to the passages from *Espinasse*; all of which except one, are taken from cases before the statute of Jeofails; and, in that one, it being necessary for the plaintiff to be at a certain place to receive his payment, he was not entitled, until he arrived there; and consequently it was necessary that the defendant should be informed of his coming; but, as before observed, it was not necessary that the defendant in this case should be informed, that the plaintiff had used due diligence. There is no variance between the evidence and declaration; for, altho the declaration does not state the deed to have been made in his character of executor, yet it is, substantially, the same thing, for he executed the deed, and it was his act; so that the allegation in the declaration was verified. Thus, in the case of a bond payable to, or given by an executor, the declaration may treat it as the act of the party without the addition of executor. *Peter* vs *Cocke*, 1 *Wash.* 257. The title in this case was conveyed; the grantee is satisfied; and the defendant has had the worth of the money; so that every precedent act, which could fairly be required, is shewn to have been actually performed. The instruction of the District Court, was not upon the whole evidence, but merely that the deed corresponded with the averments, in the declaration. It is therefore not like the case of *Keel &c.* vs. *Herbert*, 1 *Wash.* 203, where there was a general instruction to the jury upon the weight of the whole evidence. For it was wholly unimportant, whether the allegations concerning the deed, in the present case, were verified or not.

Randolph in reply. This is not a demurrer to evidence, but a bill of exceptions; and therefore the arguments drawn from the justice of the case

are irrelevant. *Lee* vs *Love* is an expreſs authority in favor of Mr. Duval's argument, becauſe it ſhews that a ſuit ought to have been brought, and the report of *Mackie* vs *Davies*, probably, does not contain the whole declaration; but, if it does, ſtill there is nothing, in the caſe, which proves, that notice may be diſpenſed with; whereas the paſſages, cited from *Eſpinaſſe*, prove that it is indiſpenſably neceſſary, and that the *ſepius requiſitus* is not ſufficient. Beſides there was a precedent act to be done here; for a title was to be conveyed; and therefore an expreſs performance ſhould have been ſhewn.

LYONS Judge delivered the reſolution of the court to the following effect. The firſt exception taken by the counſel for the appellants is, that there is no averment of notice to the defendant, that due diligence had been uſed to obtain payment from Imlay. But the court is of opinion that there was no neceſſity for ſuch an averment; for the defendant undertook to ſee the money paid; and, of courſe, it was his buſineſs to look to the performance himſelf, without any notice from the plaintiff. For the difference is, where the party cannot perform the thing, without receiving notice from the perſon to whom it is to be performed, and where he may perform it without ſuch notice, from the other ſide. In the firſt caſe, a ſpecial notice and demand is neceſſary, but not in the other; and that is the whole amount of the caſes cited from *Eſpinaſſe*, by the appellants counſel. But, in the preſent caſe, the defendant might have performed his undertaking without notice from the plaintiff; he might have conſulted the records and ſeen the deed; he might have aſcertained whether the money had been paid by Imlay; and if not, he might have had it done, without notice, or other act, on the part of the plaintiff. Of courſe, as he had entered into an expreſs undertaking, if he failed to perform it, a general allegation of the demand and refuſal was ſufficient, without ſtating a

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draw bills unleſs warranted to do ſo by placing funds in his hands; and inſiſts that his inſtructions only obliged him to receive any conſignments of grain which Hunter might ſend him, except as to another ſhip by the name of the Brinkley, which Hunter was ordered to lade. On the contrary, the inſtructions were limited to particular objects, that the defendant declined receiving the cargo of the Scipio. That his offer to accept the bills on him, was only for the honor of Hunter, and not upon his own account. That he interfered with the deſtination of the ſhip as well for the ſake of leſſening the freight, as for the benefit of Hunter, and not becauſe he conſidered the cargo as belonging to himſelf.

The depoſitions prove the ſale and delivery of the corn nearly as the bill ſtates them, and that the plaintiff, after Patten & Dalrymple refuſed to endorſe the bills, had no other alternative than to take an aſſignment of the bill of lading, as a ſecurity, in caſe Blane would not accept the bills. That the ſhip was chartered by Blane. That the reaſon given by Blane for not accepting the bills, was, that he was afraid he might not receive remittances from Ferrol, in Spain, to enable him to pay them. That Blane ſaid he had enſured the cargo to Ferrol, but, as the market there was glutted, he had ordered it to London.

The bills, dated the 6th of May 1790, are drawn by Hunter on Blane, at 60 days ſight, in favor of the plaintiff.

There is a copy of the charter party entered into by Blane with Davidſon the owner of the ſhip, for nine months or a longer time, but deſcribes no voyage in particular.

The letters of the 20th and 23d of November 1789, from Blane to Hunter, and containing the inſtructions to purchaſe are the ſame with thoſe referred to in the caſe of *Hopkins* vs *Blane*, 1 *Call* 362.—The letter of 27th of November 1789, from

Blane to Hunter confirms thoſe of the 20th & 23d of that month, adviſes him that he had ſent the brig Brinkley, concerning the diſpatch and deſtination of which it would be ſuperfluous to add any thing to what he had already written. States that the brig was to be repaired by Hunter at Blanes expence; and ſuppoſes a few days will ſuffice for it, while the cargo is preparing, ſo as not to occaſion detention.

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Letter of December 24th 1790 from Blane to Hunter, reminds him of non-payment of certain ballances, and reproaches him with having drawn further than he had authority to do, which was at the utmoſt confined to the Brinkley's cargo; that his drafts had not been accepted becauſe Hunter had not furniſhed funds, and he found he had over accepted before he was aware of the deficiency. For notwithſtanding Hunters advices were not ſatisfactory, yet Blane through confidence that Hunters reſources would ſome how or other, juſtify his drafts and reimburſe Blane, had continued to honor his bills longer than was ſtrictly proper. That even the Brinkley's cargo was purchaſed under circumſtances not warranted by the inſtructions; and that he might have rejected it for that reaſon, but had waived the right, taken the cargo and paſſed it to Hunters credit. That the other cargoes had been diſpoſed of on Hunters account. That the Scipio was loaded under circumſtances which rendered it optional in Blane to take it or not, and he choſe the latter: but previous to his knowledge of the circumſtances he had made inſurance on the cargo, the premiums of which, not having been reimburſed, he has placed to Hunters debit.

Letter from Proudfit to Hunter dated the 16th of March 1790, is as follows: "I have for ſale "ten thouſand buſhels of corn, which I will deli- "ver you at Portroyal on board any veſſel you may "ſend by the 20th of April next, at fifteen ſhil- "lings and ſixpence ſterling per barrel (of five bu-

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"shels.) Should your vessel not be there, by that "time, the corn is to be received by your friend, "and the bills given me, which are to be upon "London at sixty days indorsed by Patton and "Dalrymple."

In answer to this, Hunter by letter of the same date, agrees to take it at 15/6, payable in bills on London *at 60 days sight.*

Letter of the 11th of April, from Proudfit to Hunter, mentions that he is sending the corn to Portroyal, and wishes him to send the bills to Patten and Dalrymple.

From the same to the same dated May 16 1790, complains of his having directed Dalrymple to receive the bills of lading for the corn, as it was in consequence of his *promising to endorse the bills of lading that I accepted your bills without the indorsers promise*; Requests that he will come to Fredericksburg to see about it, *as the bills of lading must be endorsed* by Hunter to Proudfit.

An account between Hunter and Blane contains statements of sundry drafts of Hunter, in favour of different persons, paid by Blane from June to September 1790.

A witness says he was present when Hunter and Proudfit contracted; and that the bargain was for 15/6 sterling *payable in bills on London* without designating any house on which they were to be drawn. That the name of Blane was not mentioned, as the person for whom the purchase was made, that neither he nor any other person was named as in any way interested or concerned in the purchase, or responsible for the payment. That he saw the *missives* of the bargain exchanged between Proudfit and Hunter; and that the price of corn then was about 18 or 20/. Virginia currency per barrel.

The Court of Chancery decreed in favour of the plaintiff; and Blane appealed to this court.

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RANDOLPH for the appellants. Hunter plainly went beyond his powers, and therefore his act was void. For he was not to buy corn unless the other articles could not be obtained. But instead of this he purchased when the others might have been had, and he bought it above the market price too. Added to which, instead of forwarding the bills of lading immediately, as he was bound by his instructions to have done, he indorsed them in blank, and one was afterwards actually filled up to Plunket & Stewart. So that Proudfit was co-operating to prevent Blanes ability to pay. 3 *Atk.* 237. 2 *Wms.* 148. But Proudfit never knew Blane in the business; for his contract was with Hunter: and it does not even appear that he ever saw or heard of the powers from Blane to Hunter. The correspondence is with Hunter in his own name; and the bills do not specify that they were drawn on account of the agency, 1 *Call* 377. *Pow: Pow:* 118. Blane's offer to accept proves nothing; because an offer not accepted weighs nothing, *Taliaferro* vs *Robb*, 2 *Call* 258. The same arguments apply to Smith's case; for the powers were never seen in that case either, and the transaction was personally with Hunter, without reference to his agency. The length of time before the attempt to render Blane liable is very material, and shews that he was not thought of at the commencement of the transaction. *Calls rep.* 379. The decrees are therefore both erroneous; and ought to be revered.

NICHOLAS for the appellees. The powers given by Blane were the most extensive imaginable, and clearly included the present case. For he was to use his discretion of purchasing, and was not restricted but actually authorized to buy corn. If he abused those powers as it is pretended on the other side, that circumstance does not affect Smith; in whose case the bills were remitted immediately, and therefore there is no objection on the ground of delay, as there was in the case of *Hopkins* vs. *Blane*, 1 *Call* 361. It is evident from the circum-

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ſtances that the ſellers ſaw the powers before the ſales were made; but if they only heard of them it is ſufficient. In Hopkins vs. Blane there was a ſtrong appearance of credit having been given perſonally to Hunter; but here no reliance was placed on him. In that caſe the bills were not drawn for grain, but for tobacco; but here they were drawn for grain, and that was remitted to Blane: which was agreeable to the powers given by him to Hunter, who was his general agent; and therefore the caſe is expreſsly like that of *Hooe and Harrison*, vs *Oxley and Hancock*, 1 *Wash.* 19. For there is nothing to ſhew that it was a contract by Hunter on his own account, but every circumſtance manifeſtly proves that it was on account of the agency. The argument that the ſellers were voluntarily participating in the abuſe of the powers, and that the corn was purchaſed at an exorbitant price, is altogether unfounded.

WICKHAM in reply. In *Hoe & Harrison*, vs *Oxley & Hancock*, there was an extenſive general agency, to tranſact their buſineſs, given to Ponſonby, and that agency was notorious to the whole world: But here the agency was ſpecial and not generally known: So that whoever would make a title under it muſt ſhew that the agency was known to him. But this they cannot do. Hunter being a particular agent for ſpecial purpoſes had no authority to exceed them, and aught not to have drawn beyond the funds advanced by him. The plaintiffs never made any contract with Blane, but with Hunter only, and upon his own account: It is repugnant to the nature of his buſineſs to ſuppoſe theſe letters were ſhewn by Hunter; becauſe ſecrecy was Blanes object, to prevent competition in the market; and therefore it would have been infidelity in him to have divulged them. It was conſequently a tranſaction in the uſual courſe of trade, that is to ſay, a purchaſe by Hunter for bills on London, without any regard to the agency. The extravagant price given for corn, when Blane's or-

ders were to buy as low as poſſible, proves that Hunter only was truſted: For there is no proof that his affairs were at that time declining. But be that as it may, the taking of the bonds, notes, and ſecond bills, were a diſcharge of the firſt, and exonerated Blane altogether, if he ever was liable.

Cur ad vult.

LYONS Judge, after ſtating the caſe, delivered the reſolution of the court to the following effect.

In the preſent caſe, the defendant might, with ſafety, perhaps, have demured to the plaintiffs bill. For, although it charges, that the bills of exchange were taken upon the credit of Blane, yet that is inconſiſtent with the other facts ſtated in it; ſuch as the requiſition that the bills ſhould be indorſed by Patten and Dalrymple, and, when that could not be obtained, the taking of an aſſignment of the bills of lading. Theſe circumſtances prove that the bills were neither drawn, nor taken upon the credit of Blane, but that the plaintiff looked elſewhere for ſecurity. Therefore, upon his own ſhewing, it is probable, that the bill could not have withſtood a demurrer.

Be that as it may, however, the caſe is, clearly, in favor of the defendant, upon the teſtimony; for the plaintiff does not prove, that he ever ſaw, or heard of Hunter's powers before he ſold the corn to him. But, if he had, thoſe powers did not authorize Hunter to draw the bills in queſtion: For it does not appear that the contract was upon the account of Blane; ſo far from it, his name is not even mentioned in the agreement, but the ſtipulation is for bills on London, generally, to be endorſed by Patten and Dalrymple, without mentioning on whom they were to be drawn. A circumſtance which plainly ſhews that Blane was not conſidered as the perſon on whoſe account the con-

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tract was made; otherwise it is not conceivable why his name was omitted.

This however is not all. There are other circumstances which have considerable weight in determining that it was a transaction between Hunter and the plaintiff, upon the credit of Hunter only. For it appears that when Patten and Dalrymple refused to endorse, the plaintiff had it in contemplation to stop the delivery of the corn, until the bill of lading was assigned to him; which certainly would not have happened had he relied upon the credit of Blane. Besides that charge is exploded by other circumstances; for, in his letter of the 23d of April 1790, he intimates that the bills of others, indorsed by Hunter, would be received; which shews that his confidence was in Hunter himself: And therefore, after the bills were returned protested, he is found enquiring how he could secure himself, as Hunter's affairs were deranged.

These circumstances plainly prove, that the credit was not given to Blane, but to Hunter: And that the plaintiff relied on other securities for indemnity, in case his confidence in Hunter should turn out to have been misplaced.

But the case of *Hooe &c.* vs *Oxley &c.* 1 *Wash.* 19, is relied upon by the counsel for the appellee as establishing Blane's responsibility. That case carried the principle far enough, and we are not disposed to push it any further. It is sufficient therefore to remark that the analogy between the two cases is not so great as the counsel supposes; for, there, the correspondence held out an idea, that Ponsonby's bills would be honored to any extent; whereas nothing of that kind appears in the present case: Of course, the authority of that case is not so decisive as the counsel for the appellee represents.

The general rule is, that to charge the principal the agency must be proved to be universal, or the power must be explicitly given. For if the

power is limited to a particular object, it is a mere relation between merchant and factor; and the latter must act within the pale of his authority, or the principal is not bound. *Hopkins* vs *Blane*, 1 *Call*, 361. But here the agency is not pretended to be universal, and the power was limited to a particular object, which not being attended to, the correspondent could create no responsibility in the principal.

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A doctrine, contrary to this, would be ruinous to commerce. For, then, if a merchant, in one country, ordered goods from another, he would be liable to the manufacturers and shopkeepers, who furnished them, altho he had no communication with them, and there was no confidence existing, or intended to exist, between them and him; his engagement being confined to his own correspondent personally, without the least thought of extending it further.

Upon the whole, the transactions between the plaintiff and Hunter appear to have been of a private nature, and founded on the credit of the latter only. Of course there is no ground for charging Blane; and, therefore, the decree is to be reversed, and the bill dismissed with costs.

NOEL, *against* FISHER.

A bond for the sale of an office is void.

WILLIAM FISHER brought debt in the county court against Noel, upon a bond, dated the 20th of April 1789, and executed by Noel to Fisher deputy sheriff of John Upshaw high sheriff of the county of Essex; the condition of which was as follows: "Whereas the above bound "Richard Noel hath been accepted, received and "allowed to be deputy sheriff for and under the "said John Upshaw in the upper precinct or St. Anne's parish in the said county, from the com- "mencement of this bond until the expiration of "the said William Fisher's time, and for the per-

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"quiſites and benefits of the ſaid office, he agrees "and obliges himſelf, his heirs &c. to pay the ſaid "William Fiſher, his heirs, executors, adminiſtra- "tors and aſſigns, the ſum of thirty five pounds, "at two payments, one half at or upon the twen- "ty fifth day of June, the other moiety on the 25 "day of December next following, and ſo in pro- "portion for a greater or leſs time as it may hap- "pen. If therefore the ſaid Richard Noel ſhall "well and truly collect and receive all other fees "and dues put into his hands to collect, and duly "account for and pay the ſame to the officers to "whom ſuch fees are due, reſpectively, at ſuch "times as are preſcribed by law; and duly collect "all taxes and dues impoſed by law, and pay the "ſame as the law directs; and ſhall well and truly "execute and due return make of all proceſs and "precepts to him directed, and pay and ſatisfy all "ſums of money and tobacco by him received by "virtue of any ſuch proceſs to the perſon or per- "ſons to whom the ſame are due, his or their ex- "ecutors, adminiſtrators or aſſigns, and in all other "things ſhall truly and faithfully perform the ſaid "office of deputy ſheriff during the time of his con- "tinuance therein; and at all times hereafter in- "demnify them the ſaid John Upſhaw and William "Fiſher, their heirs, executors and adminiſtra- "tors, in every thing relating to the office of ſhe- "riff; then the above obligation to be void, other- "wiſe to remain in full force and virtue."——

The declaration aſſigns a breach in not paying the £35, and alledges generally that the defendant had not performed any of the conditions of the bond. Plea, conditions performed. Iſſue—Verdict and judgment for the plaintiff for £ 136 6 3 damages: Noel appealed to the Diſtrict Court, where the judgment was affirmed; and thereupon he appealed to this court.

WARDEN for the appellant, Made four points. 1. That there was no venue, as the county was not ſtated either in the margin, or the body, of

the declaration. 2. That the Breach was not sufficiently set forth, and the averment, with regard to the time during which there was to be a payment of the £35, was not certain enough. 3. That greater damages are found than are laid in the declaration. 4. That the bond is void; because it was given for the sale of an office, which concerned the administration of justice, *Rev. cod.* 63.

Noel, vs. Fisher.

SMITH and WICKHAM *contra*: There was no occasion for a *venue*, as the action was transitory, and the act of Assembly directs that the jury shall be composed of *Bye-standers;* which supersedes the necessity of a venue altogether. But at any rate the statute of Jeofails cures it. The breach is well enough laid, and there was no necessity to be more particular as to the £35. That greater damages are found, in an action of this kind, than were laid in the writ, has been decided not to be error, *Payne* vs *Elzey*, 2 *Wash.* 143. The act of 1792 does not render the bond void; for there is an express exception, in it, with regard to contracts between sheriffs and their deputies; and the contract here, though, in form, between the deputies, was substantially between the sheriff and Noel; because the approbation of the sheriff was necessary; and therefore it is within the reason and spirit of the proviso.

WARDEN in reply. It was a contract between Noel and Fisher that the latter should procure the sheriffs permission that the former should become his deputy; which is sufficient to avoid the bond; for it leads to extortion and oppression.*

Per cur. "The court is of opinion that the "judgments aforesaid are erroneous in this, that "the bond on which this suit is brought, as set forth

* It is remarkable that this case was argued on the act of 1792, although the bond was dated in 1789. I presume it was an oversight in the counsel.

Noel, *vs* Fisher.

"in the proceedings, is void in law, the same having been taken and entered into contrary to the "directions and provisions of a British statute made "in the fifth and sixth years of the reign of king "Edward the sixth, *against buying and selling* "*offices*, which statute was in force in this State at "the time the said bond was made. Therefore it "is considered that the judgments be reversed, &c.

HAIRSTON, *against* HALL.

THE Hall's brought detinue against Hairston for some slaves: and upon the trial of the cause, the parties agreed a case, which stated, that the slaves had been devised, by Sarah Hall, to her son Nathan Hall, father of the plaintiffs, for life, and at his death to her grand children as her said son should see cause to divide the said slaves among them, but if her said son should *trade*, *sell*, *or dispose*, *hire or lend* any part thereof any where or to any person during his life, or the same should be taken in consequence of any debt of his, that the slaves should be divided among the plaintiffs as soon as they were known to be out of the possession of the said Nathan, whom she appointed executor of her will. That they were taken from the possession of the said Nathan whom she appointed executor of her will. That they were taken from the possession of the said Nathan, and sold as his absolute property, by virtue of an execution against his estate. That the said Nathan is still alive; and that it did not appear that the executor had given his consent to the suit, or to the legacy, or that any person had qualified as executor, or administrator.* And the questions reserved for the opinion of the court were, 1st, Whether the plaintiffs as lega-

A legatee cannot recover a slave devised to him without proving the assent of the executor to the legacy.

* There is a certificate to the will, which is found in *hæc verba*, that the will was proved by the witnesses; but there is no certificate that the executor ever qualified thereto.

Hairston, vs Hail.

tees of Sarah, could maintain the action, without shewing the assent of the executor or administrator to the legacy? 2d, Whether the slaves could be sold, as the absolute property of the said Nathan, under the execution aforesaid? The District court gave judgment for the plaintiffs, and the defendant appealed to this court.

RANDOLPH for the appellant. The Legatees ought to have shewn the executors assent; for, if the son took possession without the assent of a qualified executor or administrator, he was a trespasser.

WICKHAM *contra*. The case is not liable to the general rule concerning the necessity of the executors assent. For the will appointed the son sole executor and universal devisee of the estate; and, as he did not qualify as executor, he was in possession, in his own right, under the devise: Of course, he was as much subject to the condition, and as liable to the forfeiture, as if there had been an express assent obtained, or he had qualified as executor: For he could not avoid his mal conduct, by saying that, as the assent of a qualified executor was not obtained, his possession was tortious; especially as it was even competent to him to do every act as executor, but bring suits.

RANDOLPH in reply. Perhaps it may be questionable if the devise over is not void: but not being satisfied upon that point, I shall submit it to the court. As the son had not qualified as executor, his possession was tortious, and the rightful administrator might have maintained an action *de bonis asportatis* against him. It is no objection to say, that, by this means, the son might avoid the condition and save the forfeiture, by taking possession and failing to qualify; because the remaindermen might have taken administration themselves, and thus have avoided the inconvenience.

Cur ad vult.

Hairſton, *vs* Hall,

LYONS Judge delivered the reſolution of the court, that the judgment was erroneous and to be reverſed, as it did not appear that there was any aſſent of the executor to the legacy.

LEE *againſt* PEACHY.

The act of limitations will not bar a motion againſt a ſheriff, for clerks tickets, put into his hands to collect.

IN February 1798, Lee, as executor of John Lee, clerk of Eſſex county, made a motion, in the county court, againſt Peachy as adminiſtrator of Samuel Peachy ſheriff of the county, for ſome clerk's tickets put into the hands of the ſaid Samuel Peachy's deputy in 1774. The motion was continued from court to court until November 1798, when the defendant plead non-aſſumpſit and the act of limitations; to which the plaintiff replied generally. The county court gave judgment for the plaintiff; and the defendant appealed to the Diſtrict Court, where the judgment of the county court was reverſed: From which judgment of reverſal Lee appealed to this court.

WARDEN for the appellant. Under the circumſtances of the preſent caſe, the act of limitations would not have been a bar in an action; for there were not five years during which there were proper characters to ſue and be ſued; and the ſheriff was but a truſtee, in whoſe favor the act of limitations never runs. Theſe objections apply with greater force in the caſe of a motion.

SMITH *contra*. There are two queſtions in this caſe. 1ſt, Whether the act of limitations applies to a motion? 2d, If ſo, whether there was a ſufficient lapſe of time in the preſent inſtance to bar the motion?

That the act does apply in the caſe of a motion, is proved by the deciſion of the court in the caſe of the *auditor of public accounts* vs *Graham*, 1 *Call*,

rep. 475. The Legiſlature, by giving the plaintiff a ſummary remedy, could never have intended to vary the rights of the defendant, or deprive him of any defence, which he might have ſet up to the action. It could never have been their intention that what would be a good plea to one ſuit, ſhould not be a good plea to another ſuit, for the ſame thing.

Lee, *vs.* Peachy.

Upon calculation it will be found, that there was an aggregate of five years, during which there was a competent perſon to ſue and be ſued. On both grounds therefore the judgment was right; and ought to be affirmed.

LYONS Judge to WARDEN—Is there any caſe where a motion of this kind has been allowed againſt executors?

WARDEN—I do not recollect.

Cur ad vult.

LYONS Judge redeliveerd the reſolution of the court, that the judgment of the Diſtrict Court was to be reverſed, and that of the county court affirmed; becauſe this court conſidered the act of limitations as not applying, inaſmuch as the plaintiff might have ſued the ſheriffs bond; and, as that right of action was ſtill exiſting, it could not be true that the act of limitations would bar the motion.

THORNTON, *against* CORBIN.

THIS was a motion to ſet aſide, an order of this court, for diſmiſſing an appeal by Thornton from a decree of the High Court of Chancery.

Query: Whether a ſuit which has been diſmiſſed by

Thornton, *vs.* Corbin.

miſtake, can be redocketed at a ſubſequent term. *Vid. poſt.*

The facts were that Mr. Marſhall had been retained as counſel for the appellant before his appointment to the office of Chief Juſtice; but had omitted to mark himſelf on the docket, or to inform the gentleman who was to finiſh his buſineſs. In conſequence of which the appeal was diſmiſſed, at April term 1801, for want of proſecution. At October term 1801, a rule was obtained by Thornton to ſhew cauſe, at this term, why the order of diſmiſſion ſhould not be ſet aſide, and the cauſe redocketed.

WARDEN for the appellee. The appellant ought always to be ready, and, as it was notorious that his former counſel was appointed to a public ſtation, he ought to have employed another, or applied to the gentleman who finiſhed the buſineſs of Mr. Marſhall. Beſides, the court have no authority to ſet aſide the diſmiſſion.

CALL *contra*. There appears to have been a ſurpriſe on the appellant, who ſuppoſed that the cauſe would have been attended to; and, therefore, if the court have power to correct the miſtake, it ought to be done. But it is clear that, at common law the court does poſſeſs the power of ſetting aſide any order or judgment which has been obtained by fraud or ſurprize. 21 *Vin. ab.* 535.—1 *Ventr*, 78. *Barne's notes* 239.

Theſe caſes clearly prove the principle, and eſtabliſh the power of the court at common law.—Nor does the act of Aſſembly *Rev. cod.* 69, make any difference. For ſect. 18 relates to the caſes enumerated in ſect. 17; and it means where appeals, writs of error and ſuperſedeas which have not been brought up within two terms, and have for that reaſon been diſmiſſed, that there no new appeal, writ of error, or ſuperſedeas ſhall be allowed; and not a diſmiſſion where the cauſe has been brought up in time: And there is a good reaſon for the diſtinction: namely, that in thoſe caſes the diſmiſſion is to be unleſs cauſe be ſhewn to the contra-

ty, and therefore notice is required, and the appellant, if he wiſhes it, heard againſt the diſmiſſion. After which he ought not to be allowed to inſiſt upon the ſame matter over again. But here he has never been heard at all; and therefore there is not the ſame reaſon for diſallowing the motion to ſet aſide the order which was obtained by ſurprize, and to redocket the cauſe.

Thornton, ex Corbin.

WARDEN & WICKHAM in reply. The caſes cited do not apply, as they were all caſes of plain fraud, and there was none here. The practice would be attended with dangerous conſequences; for, if allowed, it may be carried to an alarming extent. Thus, if an office judgment be obtained, the defendant may inſiſt that he employed counſel to defend him, who failed to appear, and for that reaſon ſet aſide the judgment, although regularly obtained. Some difficulty too may ariſe from the order having been tranſmitted to the Court of Chancery; where it has probably been entered, and an execution iſſued in conformity thereto.

CALL. No inconvenience of the nature mentioned on the other ſide is to be apprehended from the precedent; becauſe the judgment will never be vacated but for fraud or ſurprize; nor then without the applicant has ſubſtantial juſtice on his ſide. For an application merely for delay would not be countenanced. But with this limitation the practice is uſeful, tends to promote juſtice, and is agreeable to the principles of the law: like the caſe of 1 *Wilſ.* 177, where the defendant inſtructed his attorney to plead that the bond was given for a gaming conſideration, but he omitted to do ſo, and on affidavit of theſe facts the plea was allowed after the uſual time. In the Federal Court, two judgments were ſet aſide, at ſubſequent terms, upon the ſame ground that the application is made in the preſent caſe; which ſhews the general opinion entertained of the law in ſuch caſes.

Cur adv. vult.

Thornton, vs. Corbin.

LYONS Judge Delivered the reſolution of the court. That whatever might be their opinion in other caſes of this kind, in the preſent inſtance, they were clearly of opinion that Thornton had not made ſuch a caſe as ſhould entitle him to have his cauſe re-docketed. For he does not ſhew, that he was under any ſurprize, or that he gave himſelf any trouble about the matter. It is only ſtated that Mr. Rootes applied; but by what authority, or why application was not made to counſel, after Mr Marſhall left the bar, does not appear.

RULE to be diſcharged.

CALL then moved, that the order might be ſuſpended until the arrival of Mr. Rootes, to ſee if the defect of evidence, as to the ſurprize, could not be ſupplied; and read the certificate of Mr. Marſhall in theſe words: "I am told that it is queſtioned "whether I was employed for Thornton, in the "Court of Appeals, from the Court of Chancery? "I was employed, and certainly ſhould have ap- "peared, had I been preſent when the caſe was "called. I had not received the fee, but attribut- "ed that entirely to my being ſo frequently from "home, and certainly felt no difficulty on that ac- "count with Col. Thornton. I did not think from "my idea of the ſtate of the docket, that the cauſe "could have been heard ſo ſoon, as I underſtood "it was diſmiſſed; but I really thought I had been "marked."

Per cur. That is not ſufficient. Mr. Thornton ought to have applied to counſel himſelf, after Mr. Marſhalls appointment.

RULE Diſcharged.

MANDEVILLE, *against* MANDEVILLE.

RANDOLPH for the appellant. The cauſe ought not to have been tried, without conſent, at the firſt term after the office judgment; for the act of Aſſembly directs that the ſame practice ſhall be obſerved in the county courts, as in the Diſtrict Courts: where the rule is to poſtpone the trial till the next term. But there is no conſent ſtated here, and therefore the judgement is erroneous.

The defendant may be ruled to trial in the county court, at the firſt term after the office judgment.

WICKHAM *contra.* The law does not forbid the trial at the firſt court. For the act directs that it ſhould be immediately put at the end of the iſſue docket. *Rev. Cod.* 95; and then it muſt, neceſſarily, ſtand ready for trial, if the court reach it. Beſides, as there is no exception to the trial, the preſumption is, that it was had by conſent.

Per. Cnr. Affirm the judgment.

READ, *againſt* PAYNE.

JESSE PAYNE by his laſt will, after ſome ſpecific deviſes of land to his ſons, devised as follows, "I give and bequeath unto my beloved wife "Frances Payne, during her natural life, the following 8 negroes, Dick, Gerald, Hannah and "her child, Sarah Truelove and her two children "Bett and Harry and Joe." He afterwards gives 17 other negroes to his two ſons: And then deviſes as follows, "All the reſt of my eſtate, I leave "at the time of my death, I deſire may be equally "divided between my beloved wife Frances Payne "and my dear ſons George Morton Payne and "Richard Baylor Payne and their heirs forever."

An *ex parte* affidavit of a witneſs to the will, ſtating matters not appearing in the will, is no evidence; and ought not to be recorded.

What paſſes under a reſiduary deviſe.

Read, vs Payne.

At the time of proving the will, one of the witneſſes depoſed that the teſtator "deſired that the 8 "negro ſlaves left to his widow for her life, and "their increaſe ſhould be equally devided between "his two ſons George Morton Payne, and Rich- "ard Baylor Payne, after the deceaſe of his ſaid "widow Frances, and further, he the witneſs "wrote the will, and that the reaſon this diſpoſi- "tion was not mentioned in the will was, that "the teſtator appeared to be going out of his ſen- "ſes, and time would not permit to inſert it." The queſtion was whether the remainder, after the death of the wife, in the ſaid 8 negroes deviſed to her were part of the reſiduum, or belonging to the ſons, in excluſion of the repreſentatives of the wife? The Court of Chancery decided in favour of the ſons, and Read, who had married the widow, appealed to this court.

RANDOLPH for the appellant. The reſiduary clauſe clearly paſſed the reverſion in the ſlaves given to the teſtators wife for life. The word *Eſtate* is *genus generaliſſimum* and paſſes the whole intereſt 19 *Vin. ab.* 222. *Co: Lit.* 345. If this conſtruction be not adopted then the reverſion will not paſs, although the teſtator has declared his intention to diſpoſe of the whole of his eſtate. In *Cole* vs *Claiborne* 1 *Wash.* 262, an eſtate for life in ſlaves was given, with a general reſiduary clauſe of the remainder of his eſtate, and it was held that the reſiduary clauſe carried the reverſion, and this is confirmed by the doctrine in *Kennon* vs *Mr Roberts*, 1 *Wash.* 96. That the tenant for life in the preſent caſe was one of the deviſees will make no difference; becauſe ſtill the reſiduary clauſe is broad enough to embrace the reverſion. The affidavit of the ſubſcribing witneſs will not help the appellee, as it was *ex parte*, and made when thoſe intereſted were not preſent to croſs examine. Beſides, if regularly taken, it would be inadmiſſible to deſtroy the effect of the words of the will. *Pow. Dev.* 518. Which clear-

ly proves that parol evidence cannot be received in a caſe like this.

Read, *vs* Payne.

NICHOLAS *contra*. The word *Eſtate* may be confined to the ſubject of the deviſe, and does not neceſſarily, in all caſes, include the intereſt. It is therefore an equivocal expreſſion, and according to Mr. Randolph's own book *Pow. Dev.* may be explained by parol evidence. Beſides it is intended to ſupply a clauſe which was accidentally left out. It appears from the general complexion of the bill, anſwer and will, that there was other eſtate to ſatisfy the reſiduary clauſe; and then it falls within the influence of *Kennon* vs *M'Roberts*, 1 *Wash.* 96. Which expreſſly takes that diſtinction; for the reſiduary clauſe there was held to be ſatisfied by the other property. This is confirmed by the doctrine in *Cole* vs *Claiborne*, 1 *Wash.* Which, rightly underſtood, is a caſe in our favour. The deviſe is of the property he ſhould leave at his death; which means not an ideal reverſion, but ſuch as was ſuſceptible of a diviſion. This conſtruction is to be preferred, becauſe it is conſiſtent with the diſpoſition made by the teſtator of the reſt of his ſlaves; and becauſe the whole complexion of the will ſhews, that the teſtator only intended a proviſion for his wife during her life, and that his children ſhould have the reſidue. The affidavit having been made *ex parte* will make no difference; as the witneſs is dead and could not be examined.

RANDOLPH in reply. The reverſion is as capable of diviſion as the ſlaves themſelves: Of courſe there is no reaſon for excluding it from the operation of the reſiduary clauſe. Beſides there is no proof in the record that there was any other property to ſatisfy the reſiduary deviſe. None of the ſons prove that parol evidence may be received in ſuch a caſe as this; or that a new clauſe may be added to the will, by evidence.

Cur. adv. vult.

Read, *vs* Payne.

Per Cur. "The court is of opinion, that the "information, or additional teſtimony of Joſeph "Robinſon, who was a witneſs to the will of Jeſſe "Payne the teſtator in the bill named, given at "the time he proved the ſaid will in the county "court of Goochland, without any notice thereof "to the parties intereſted in the eſtate of the teſ- "tator, in order to prove the deſires of the teſta- "tor and to explain the written will exhibited in "court for proof only, ought not to have been ad- "mitted, or regiſtered, with the probate of the "ſaid teſtament, or read in evidence in this cauſe, "without the conſent of the parties; and this "court, being of opinion that the appellant is, un- "der the reſiduary deviſe in the ſaid will, entitled, "in right of his late wife Frances, who was wid- "ow, and one of the reſiduary legatees of the teſ- "tator Jeſſe Payne, to one third part of the 8 ſlaves "deviſed by the will of the ſaid Jeſſe to the ſaid "Frances for life, and to one third of their increaſe, "with their profits ſince the death of the ſaid Fran- "ces; and that ſo much of the decree aforeſaid as "directs the appellant to deliver up to the appellee "more than two thirds of the ſaid ſlaves with their "increaſe, and to account for their profits, is erro- "neous, Doth decree and order, that ſo much of "the ſaid decree as is herein before ſtated to be er- "roneous, be reverſed and annulled, and that the "reſidue thereof be affirmed.

CAVAN & KENNEDY,
againſt
MARTIN.

A mariner, who quits the ſhip after the capture, with out the aſſent of the owners, or having been forced to do ſo by the captors is not entitled to wages, to the time of the capture.

MARTIN brought *indebitatus aſſumpſit* againſt Cavan & Kennedy, in the county court, and declared for work and labour done and performed. Plea, *Non Aſſumpſit* and iſſue. Upon trial of the cauſe, the defendant filed a bill of

exceptions to the courts opinion, whereby it appeared, that Martin, a mariner, entered on board the ſhip *Polly & Nancy* on a voyage from Alexandria in Virginia to Rotterdam, and from Rotterdam to St. Ubes, and from St. Ubes, back again to Alexandria. That the veſſel went to Rotterdam, where ſhe diſcharged her cargo, took in ballaſt, and went to St. Ubes, where ſhe took on board a cargo of ſalt, fruit and wine, for Alexandria, but on her paſſage, was captured by a French privateer, recaptured by an Engliſh Ship of war, and carried into Cape Nicholas Mole, where, after laying three months, ſhe was cleared on paying ſalvage, and afterwards arrived at Alexandria. That the plaintiff left the ſhip on her being captured by the French privateer. That the defendants prayed the opinion of the court whether the evidence was ſufficient to charge the defendants with the plantiffs wages from Rotterdam to the time of the capture by the French privateer; and that the court gave it as their opinion that the evidence was ſufficient to charge the defendants with the wages aforeſaid. Verdict and judgment for the plaintiff, and the defendants appealed to the Diſtrict Court, where the judgment was affirmed; and thereupon the defendants appealed to this court.

WICKHAM for the appellants. The veſſel was captured before the voyage was ended, and the plaintiff left her without the aſſent of the owners, or having been forced to do ſo by the captors. Of courſe he was not entitled to his wages; for they are never allowed unleſs the voyage is finiſhed, or prevented by the act of the owners themſelves, or the government. 4 *Bac. ab. new edit.* 617. Thus in the caſe of the veſſel being ſeized for debt, or forfeited by ſome violation of the law, it is the act of the owner that interrupts the voyage; and in the caſe of an impreſſment in *Term rep.* it is the act of the government. But where there is no act of the owner or interference of the

Cavan, vs Martin,

government, the mariner must serve out the voyage, or he loses his wages. Again, the court erred in instructing the jury that the plaintiff could recover wages to the time of the capture; for they could not consistently with the decisions of this court, instruct the jury upon the evidence; but ought to have left the cause to their determination without any opinion from the court. *Keele &c. vs Herbert*, 1 *Wash.* 138.

Cur. adv. vult.

Per. Cur. "The court is of opinion, that the "evidence of John M'Knight, given in his deposi- "tion, being the only evidence in this cause, was "not sufficient to charge the appellants with the "wages of the appellee, from the port of Rotter- "dam to the time of the capture of the vessel, in "the said deposition mentioned, or with any part "of the said wages, and that the judgments of the "District Court, and of the Court of Hustings, are "erroneous. Therefore it is considered that they "be reversed &c."

WILLIAMS Ex'r. of YOUNG, *against* STRICKLER.

If the right judgment be rendered in the county court, and upon an appeal to the district court, the clerk sends up an erroneous record, on wh' the judgment is affirmed; This court will, upon a view of the record of the county court, reverse that of the district court, and direct them to issue a writ of *certiorari* for the true record, so that the right judgment may be given.

IN this case suit was brought against Williams as executor of Young, upon a promise made by the said Young in his life-time, and a verdict being rendered for the plaintiff in the county court, judgment was entered for him against the defendant *de bonis testatoris* (as appeared by a copy of the judgment, obtained by the appellees counsel, from the county court, since the cause was brought into the court of appeals;) but the clerk, in making out the record, sent up to the

Williams, vs. Strickler.

District Court, stated the judgment to have been rendered against the defendant *de bonis propriis*. The District Court, without correcting the mistake, affirmed the judgment, upon the erroneous record; and, from the judgment of affirmance, Williams appealed to this court.

CALL for the appellant. The judgment of the District Court is clearly erroneous, as the suit was against the defendant as executor, and the judgment of the District Court subjects him *de bonis propriis*.

WICKHAM *contra*. Admitted the judgment of the District Court to be erroneous; but prayed some process, either to the District or county court, to correct the mistake.

Cur. adv. vult.

Per. Cur. The court is of opinion, that the judgment of the District Court is erroneous, in affirming that of the county court against the appellant as executor of the said Edwin Young, without directing the damages and costs tobe levied of the goods and chattels of the said Edwin Young in the hands of the appellant to be administered, if so much thereof he had, but if not, then of his own goods and chattels according to law; therefore it is considered that the said judgment of the District Court be reversed and annulled: And, on the motion of the appellee, who suggested that the transcript, of the record of the proceedings in the county court, transmitted to the District Court in this cause, is not correct; and it appearing, by a separate copy of the judgment in the county court, certified by the clerk thereof, that there is a material variance between that, and the judgment aforesaid, the cause is remitted to the District Court, for that court to obtain by *Certiorari*, or otherwise, a true and correct transcript of the judgment of the said county court, and for further proceedings to be had therein.

THORNTON,
against
CORBIN.

[*Ante* 221.]

If a ſuit be diſmiſſed, by ſurpriſe of the appellant, it may be redocketed at a ſubſequent term.

THE appellent having this day produced further affidavits, proving the ſurpriſe, the order, diſcharging the rule for ſhewing cauſe, why the ſuit ſhould not be redocketed, was ſet aſide; and the cauſe put upon the docket again, in the place in which it formerly ſtood.

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CASES ARGUED AND DETERMINED IN THE *COURT OF APPEALS* IN OCTOBER TERM OF THE YEAR 1802.

TUTT *againſt* LEWIS.

A man, contracting on behalf of the ſtate, is not liable in his individual capacity.

IN aſſumptſit brought by Brooke and Tutt againſt Lewis's executors, the jury found a ſpecial verdict, which ſtated that in the year 1777 the defendants teſtator contracted with the plaintiffs as public contractors for the building of a magazine, as ſtated in the account annexed to the verdict, which begins thus "*Dr. Colonel Fielding Lewis deceaſed (on account of the commonwealth of Virginia) to Richard Brooke and James Tutt.*" Then follows the items, which are charged in ſpecie and are for work, and materials advanced: But ſums more than equal to the amount of the account are credited as paid in paper money; and at the foot of the account theſe words are added "By our "agreement with Colonel Lewis he was to find us "plank, nails, ſhingles, locks, hinges, paint and "glaſs, which he failed to do. We were obliged "to furniſh the articles charged in paper currency "as above, in order to carry on the work, the "10,000 ſhingles Colonel Lewis purchaſed and "charged us with in our private account." That the plaintiffs compleated the work and made the advances as ſtated in the ſaid account. The ver-

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dict then finds for the plaintiffs £797 14 9¼ if the court ſhall be of opinion that Lewis was liable to pay the account, and that the payments in paper money are not a diſcharge in full, but otherwiſe, for the defendants; The county court gave judgment for the defendants, which the Diſtrict Court affirmed, and the plaintiffs appealed to this court.

The court affirmed the judgment, upon the principle ſettled in the caſe of *Syme* vs *Butler executor of Aylett* 1 *Call* 105, that a man, contracting on behalf of the State, was not liable in his individual capacity.

M'GUIRE,
againſt.
GADSBY.

If ſeveral ſmall promiſſary notes be given for a large one, it is no ſatisfaction unleſs paid; & therefore ſuit may be brought on the large one.

M'GUIRE brought debt againſt Gadſby in the corporation court upon a note for 550 dollars, plea *nil debit*, and iſſue. Upon the trial of the cauſe the defendant filed a bill of exceptions ſtating, that it appeared in evidence that eleven notes of hand not ſealed, of fifty dollars each, were given by the defendant to the plaintiff after the note on which the ſuit was brought became due; that it was admitted thoſe notes were not given in conſequence of any new debt contracted by the defendant with the plaintiff; and that a witneſs who was preſent at the making of the notes gave it as his opinion to the jury that they were given by the defendant and received by the plaintiff in payment of the ſaid note on which the ſuit is brought. That the witneſs further proved that four of the ſaid ſmaller notes were at firſt given by the defendant, and the others afterwards; that he underſtood and ſo declared to the jury that the plaintiff, in conſideration thereof, agreed to give up to the defendant the ſaid note for 550 dollars.

That it also appeared in evidence that three of the said small notes had been paid by the defendant. And that the plaintiff produced the other 8 at the trial of the cause, and tendered them to the defendant. That the plaintiff prayed the opinion of court whether the said small notes were a payment of the note on which the suit was brought, and that the court gave it as their opinion, and so instructed the jury, that they were no payment, or discharge of the said note for 550 dollars on which the plaintiff had brought his suit. Verdict and judgment for the plaintiff; and the defendant appealed to the District Court. Where the judgment was reversed, and from the judgment of reversal Gadsby appealed to this court.

Botts for the appellant. The small notes were no discharge, for it was no payment; nor was it a higher security. 1 *Bac.* 23. 2 *Burr.* 9. It could therefore, at most, only operate as an accord and satisfaction; but then it must have been pleaded, and could not have been given in evidence. *Esp.* 147. So that either way the evidence was inadmissible, and therefore the direction given by the hustings court was correct, and their judgment ought to be affirmed.

Lee *contra.* There was an express agreement, that the small notes should be taken in satisfaction of that upon which the suit is brought. It is therefore immaterial whether they be considered as a higher security or not. For the creditor agreed to accept them as a discharge, and he ought to be bound by his agreement.

Cur adv. vult.

ROANE Judge, at the request of the President, delivered the resolution of the court as follows:

This was an action of debt, brought by M'Guire against Gadsby in the Hustings Court of Alexandria, for 550 dollars, upon a promissary note, dated the 29th July 1797, payable in 90 days, negotiable at the Bank of Alexandria, and protested

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at the requeſt of the Preſident and directors of that Bank, October 31ſt (four days after the day of payment had expired.) Upon the plea of *owe nothing* the parties were at iſſue, and on the trial the defendant gave in evidence, "That, after the "paſſing of this note, eleven notes of 50 dollars "each, not ſealed, were given by the defendant "to the plaintiff; which it was admitted, were "not given for any new debt, and a witneſs preſent "when they were given, gave his opinion to the "jury, that theſe notes were given and received "in payment of the note in ſuit. That four of "them only were given at firſt, and the others af-"terwards; when he the witneſs underſtood that "the plaintiff agreed in conſideration of theſe to "give up the other. It is further ſtated, in the "bill of exceptions, that three of the ſmall notes "were paid, and the plaintiff, at the trial, pro-"duced the other eight, and tendered them to the "defendant." Upon this evidence the defendants counſel moved the court to inſtruct the jury, that the ſmall notes were a payment, or diſcharge, of the other: but the court gave a contrary direction, that they were no ſuch payment, or diſcharge. A verdict paſſed for the plaintiff, for the debt, with damages and coſts; for which judgment is entered, with a rule, at the foot, that the debt may be diſcharged by 400 dollars (diſcounting the 150 dollars paid upon three of the ſmall notes). The defendant, having ſtated his exceptions, appealed to the Diſtrict Court; where the judgment was reverſed, and a new trial directed, in which the defendant is to be at liberty, to give in evidence the notes rejected. From this reverſal, the appeal is to this court; and the queſtion is, whether the inſtruction of the huſtings court to the jury was a mis-direction? The 8 ſmall notes not ſatisfied, are in the record; and are all of the ſame date, and tenor, *viz*, November 6, 1797 (ſix days after the proteſt,) except that they are payable at different periods from 19 to 60 days; the laſt of which expired January 5th, 1798, three months

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before the ſuit was brought, which was commenced in April upon the old note. They are on the ſame terms with the note in ſuit, ſo as to be negotiable at the Bank, but are not proteſted as the other was. It is ſaid that the plaintiff ought to have returned the ſmall notes before he brought the ſuit: And if they had been drafts of the defendants upon a third perſon, not accepted, he ought to have done ſo, notice in that caſe to the defendant being material; but this was not neceſſary in the preſent caſe, ſince the defendant was equally liable upon both, and it was indifferent to him which. The declaration gave him notice that he was ſued on the old note, and therefore was not liable upon the ſmall ones; which, however, were properly tendered him on the trial. The queſtion is, whether the ſmall notes were a payment, or diſcharge, of the former, which was held by the plaintiff, and not given up on receipt of the other? In point of juſtice there ſeems no difficulty; the plaintiff is in purſuit of a juſt demand, which he has recovered; and the preſent attempt is to ſubject him to coſts and delay, for that he ought to commence a new ſuit, or ſuits, upon the ſmall notes, in which the ſame principles, without a ſingle eſſential change in the ſituation of plaintiff or defendant, are to govern the deciſion. This attempt, therefore, ought to be ſupported, by ſtrict law before it ſhould receive the ſanction of this court, and how is the law?

Firſt. View it as an accord between the parties: It was truly ſaid, by the counſel, that an accord cannot be given in evidence, but muſt be pleaded; and he might have added that it muſt be pleaded with ſatisfaction too; that is, that the thing ſubſtituted has been performed. In both points therefore the defendant has failed. He did not plead it, nor were the ſmaller notes paid. Next, view it in the light of a *merger:* Do the ſmaller notes extinguiſh the former? On this ſubject we take the law to be ſettled, that, in order to make one

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inſtrument an extinguiſhment of another, the latter muſt be of a higher dignity than the former, or muſt put the plaintiff in a better condition: Neither of which is the caſe of theſe notes, all preciſely of the ſame tenor, and not ſealed; nor do the latter place the plaintiff in a better condition than the former: They benefit the defendant indeed, by giving him a further day of payment; which he did not avail himſelf of, and cannot now turn that favour to the prejudice of the plaintiff, who did not ſue 'till three months after the moſt remote payment was to have been made.

Mr. Lee admitted the rule in general, but inſiſted that where there was an agreement to accept the latter notes in ſatisfaction of the former, they ſhall have that operation; and this agreement was proved by the witneſs, as ſtated in the exception. Whether the jury would have found the fact of the agreement, upon the opinion and underſtanding of the witneſs, oppoſed by the circumſtance of M' Guires having retained the original note, and its not having been called for by Gadſby, is uncertain; but admitting the agreement proved, Mr. Lee's caſes do not apply. In *Clarke* vs *Mundall*, 3 *Salk.* 48, the agreement to take a bill of exchange for the debt, which is to be an extinguiſhment of it, is made at the time of the original contract, the ſale of the goods; but, in that caſe, a bill endorſed at, or on a ſubſequent day, was no ſatisfaction, without payment. And to ſuch Holt does not apply the exception of a ſpecial agreement. The 1 *Esp.* 49, takes notice of this, and ſays a ſtatute has altered the rule as to inland bills, which declares them, when accepted, a ſatisfaction, if the perſon accepting does not take his due courſe to get them accepted and paid, but if he does uſe due diligence, he does not ſuſtain the loſs. 2 *Salk.* 442 *Ward* vs *Evans*. A goldſmiths note, received for money, and not paid, is no ſatisfaction, without an expreſs agreement that it ſhall be received as caſh. All the caſes re-

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pect bills, orders, and notes, wherein third persons are concerned: They do not, therefore, shake the authority in 1 *Burrows* 9, and 1 *Str.* 426, that a promissary note shall not be extinguished by a subsequent promissary note given by, and to the same person, which is the case before the court. We think, therefore, that the directions of the Hustings Court was right, that the judgment of the District Court ought to be reversed; and that of the Hustings Court affirmed.

HERBERT & WIFE, *against* WISE & Others.

How far evidence *de hors* the deed may be received.

IN ejectment, brought by Herbert & wife against Wise and others for a tract of land in Fairfax county, upon the trial of the cause the defendants filed a bill of exceptions stating, that the plaintiffs in order to prove their title gave in evidence a patent to George Brent, dated in 1677, for 1143 acres of land on Hunting creek; the will of George Brent, in 1694, by which he devised that land to his son George Brent junior, who by his will, in 1700, devised 400 acres thereof, to be first laid off, to his brother Henry, other 400 acres to his brother Robert, and to his brother Nicholas Brent the residue of the said land, being the plantation whereon Robert Williams was tenant, and containing 343 acres; the will of Nicholas Brent, by which, in 1711, he devised the last named land, called by him 400 acres, to be sold for payment of his debts; and lastly a deed from Robert Brent executor of Nicholas to John Ball, wherein, after reciting the will of Nicholas Brent, he, in pursuance thereof, conveys to Ball a certain parcel or tract of land on Hunting creek, being 343 acres, and described to be part of a tract of 1143 acres patented

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to George Brent the elder, given by him to George Brent junior, deviſed by the latter to his three brothers in the terms of the deviſes to them, and bounded as follows, ſetting forth the boundaries. That the defendants moved the court to inſtruct the jury that no more land was conveyed to the ſaid John Ball than the quantity contained within the metes and bounds expreſſed in the ſaid deed to him from Robert Brent executor of Nicholas Brent: And that the court inſtructed the jury accordingly. Verdict and judgment for the defendants; and thereupon the plaintiffs appealed to this court.

BROOKE for the appellant. Although it be generally true that the court is to decide what eſtate is conveyed by the deed, yet it is frequently neceſſary to reſort to ſomething extraneous, in order to decide what quantity of land is conveyed. This was abſolutely neceſſary in the preſent caſe; becauſe there was an expreſs reference, in the deed itſelf, to the other patents and conveyances; which therefore were clearly admiſſible. It is not like the caſe of *Gatewood* vs *Burrus* * at the laſt term; becauſe there was no ſuch reference in that caſe.

WICLHAM *contra*. The court were to decide on the deed itſelf; and they might inſtruct the jury upon the effect of it. There is nothing to ſhew that this precluded the other teſtimony, and the preſumption is, that he had none to offer, as it is not ſtated in the bill of exceptions. But, if the party had other teſtimony, it was inadmiſſible, as the deed itſelf was the only rule: For there is no difference between this caſe and that of *Gatewood* vs *Burrus*. The court only declared its opinion on the deed, and there is nothing to ſhew that the metes and bounds differ from the patent; although the evidence is ſtated: In which reſpect the caſe is leſs liable to exception, than that of *Gatewood* vs *Burrus*; for there the parol evidence was not ſtated.

* *Ante*, 194.

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RANDOLPH in reply. The reference to the other deeds and patents, introduced the right to the extraneous evidence. The jury may explain the quantity which is included within the boundaries described in the deed, and evidence may be given, in order to enable them to do so. It is said that there is nothing to shew that we had other evidence; and therefore that we had no ground of exception. But we could not have offered it after the courts opinion had been so decidedly given. *Gatewood* vs *Burrus* was a different question, altogether.

PENDLETON President delivered the resolution of the court as follows:

This was an ejectment, in the District Court of Dumfries, for 1320 acres of land, in Fairfax county. Upon the trial, the plaintiffs, in order to prove their title, gave in evidence a patent to George Brent, dated in 1677, for 1143 acres of land on Hunting creek, the will of George Brent in 1694, by which he devised that land to his son George Brent, jun. who, by his will in 1700, devised 400 acres of that tract, to be first laid off, to his brother Henry; other 400 acres to his brother Robert; and, to his brother Nicholas Brent, the plantation, the residue of the said land, whereon Robert Williams was tenant, being 343 acres: The will of Nicholas Brent, in 1711, by which he devises this land called, by him, 400 acres, to be sold for the payment of his debts: And a deed, in 1715, from Robert Brent, executor of Nicholas to John Ball, wherein, after reciting the will of Nicholas, he, in pursuance thereof, conveys to Ball a certain parcel, or tract of land, on Hunting creek, being 343 acres, part of a tract of 1143 acres, patented to George Brent the elder, given by him to George Brent junior, whose devises, to his three brothers, are literally copied; the said 343 acres being bounded as followeth, and the bounds are inserted. Here the counsel for the

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defendant interposed, and moved for the direction of the court to the jury, "that no more land "passed to John Ball under the patent, wills and "deed, than was comprehended in the metes and "bounds mentioned in the deed:" Which direction being given accordingly, a verdict passed for the defendant. The plaintiff filed exceptions to the courts opinion, and appeals; and the question now is, whether that opinion was a misdirection? To pursue the proper descriptions of our land boundaries would render mens titles very precarious, not only from the variations of the compass, but that old surveys were often inaccurate; and mistakes often made, in copying their descriptions into the patents; leaving out lines, and putting north for south, and east for west; and in copying those descriptions into subsequent conveyances: Whereas the marked trees upon the land remain invariable, according to which neighbours hold their distinct lands. On this ground our juries have uniformly, and wisely, never suffered such lines, when proved, to be departed from, because they do not agree exactly with descriptions in conveyances. However, when a question arises, what passes by a written instrument? it is proper for the court to decide that question; and we proceed to consider, whether the opinion given by the District Court upon this deed, was legal and proper? And we think not; for that, by the will of George Brent junr. his brother Nicholas was entitled to all the Hunting creek tract, besides the 800 devised to Henry and Robert, whatever was the quantity, the words, residue of the tract, controling the supposition of the quantity; that the will of Nicholas authorised the sale of his whole right, and that the deed to Ball was intended to be, and was a conveyance of the whole; being of the parcel or tract supposed to be 343 acres; from the recital of the patent and wills, and the same terms used essentially, as are in the devise by George Brent to his brother Nicholas. We are therefore of opinion, that it was a misdirection in

the court and that the plaintiffs ought to have been permitted to proceed, and shew, if they could, that they had the same title as Ball had. The judgment is therefore to be reversed with costs, and a new trial ordered, on which the plaintiffs are to be permitted to shew, if they can, that they have the same title that Ball had.

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ROBINSON, *against* GAINES.

GAINES as administrator of Minor, brought debt in the county court against Robinson and others, executors of Michael Robinson upon a bond, given by the said Michael; dated the 2d day of February 1768, and payable on or before the 1st of June afterwards. The defendants took oyer of the bond, and filed the following plea.—And the said defendants say, that heretofore viz. "The 5th day of July in the year one thousand "seven hundred and sixty eight, in the lifetime of "the said Joseph Minor and of the said Michael "Robinson their testator; the said Joseph Minor "impleaded the said Michael Robinson in the "court of Spotsylvania upon the bill obligatory, "and for the same sum of money, mentioned in the "now plaintiffs declaration, in which suit such "proceedings were had, that at a court held for "the said county in August 1770 the said Michael "plead a tender of the said debt, and did then and "there tender into court, and pay into the hands "of the clerk of the said court, the principal and "interest due thereon, amounting to the sum of— "which has been always, and now is, as these "defendants suppose, ready to be paid to the said "Joseph Minor, or to the said plaintiffs, when de-"manded; and this they are ready to verify;

As upon a plea of tender, the money must by law accompany the plea, the defendant in a subsequent suit may plead the tender of the money into court, in the first action, and prove the payment to the clerk, which, if found in his favour, judgment will be entered for him.

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"wherefore they pray judgment, whether the plaintiff, his action aforeſaid, ought to have, or maintain &c." General replication, and iſſue. Upon the trial of the cauſe the plaintiffs filed a bill of exceptions to the courts opinion ſtating, that he moved the court "to inſtruct the jury, that unleſs "they found that the coſts, as well as the principal and intereſt which had accrued previous to "the bringing the money into court, had been "brought in, they ſhould find for the plaintiff; and "alſo to diſregard the parol teſtimony introduced "to prove the payment of the money into court, "inasmuch as it was not the beſt evidence that "the nature of the caſe would have admitted of; "This being a fact which ſhould have been proven "by record, and that there is no record but that "filed in this cauſe, produced; but that the court "refuſed to inſtruct the jury to this effect."— Verdict and judgment for the defendants; and the plaintiff appealed to the Diſtrict Court; where the judgment of the county court was reverſed; the pleading ſubſequent to the declaration ſet aſide; and the parties ordered to plead anew. In conſequence of which the defendants plead payment; and the plaintiffs took iſſue. Upon the trial of the laſt iſſue, the defendants filed a bill of exceptions ſtating, that they "offered parol "teſtimony and depoſitions to prove that the defendants teſtator "had, previous to the 5th of July 1768, tendered, to the plaintiffs inteſtate, the amount of the "principal and intereſt, then due, on the bond in "the declaration mentioned; and the copy of the "record in the former cauſe (which is ſet forth *in* "*hæc verba*, and ſtates that, at Auguſt court 1768 "oyer, and time to plead, were allowed the defendant; that, in Auguſt 1769, further oyer "and time to plead were allowed;" and then the record proceeds thus, *at August court* 1770, *the defendant plead a tender of the plaintiffs debt; and time, till the next court, was allowed the plaintiff to conſider thereof*" After which, it ſtates, that in June 1771, the plaintiff replied generally,

and that time was allowed the defendant. That in July 1773, iſſue was joined on the replication. That in September 1773, the cauſe was refered; but the order of reference was ſet aſide at the ſame term; and in Auguſt 1782, the ſuit abated by the death of the plaintiff. There are two *memoranda*, at the foot of the record, made by the clerk, the firſt is in theſe words: *N. B. None of the pleas mentioned in these proceedings are filed in writing, nor is the sum of money tendered mentioned on the records.* The ſecond is as follows: *The writ, in this cause, is dated the fifth day of July* 1768.) "To prove that, on that day, a ſuit was commenced by the plaintiffs inteſtate againſt the defendants teſtator, on the bond aforeſaid, in which ſuit the plea of tender was pleaded and iſſue taken thereon; and, by parol teſtimony, that upon the filing of ſaid plea, the amount of the principal and intereſt, due when the ſaid tender was made, was paid into court, and received by the clerk, and that the whole amount had been loſt by the inſolvency of the ſaid clerk. But, the ſaid teſtimony being objected to by the plaintiff, the court was of opinion that the ſaid *parol testimony* was improper." Verdict and judgment for the plaintiff; and the defendants appealed to this court.

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RANDOLPH for the appellant. The evidence of the tender was admiſſible; and therefore the Diſtrict Court erred in excluding it.

WILLIAMS *contra.* This was not a motion to bring the money into court, but an attempt to give evidence of what paſſed, upon a former occaſion of that kind. But, if it had been ſuch a motion, there ought to have been a rule for that purpoſe; and principal, intereſt, and coſts ought to have been tendered. The defendant ought to have pleaded the tender, becauſe the plaintiff would have had a right to take iſſue upon it. He could not take out the money under the former ap-

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plication. It was not a tender under the act of Aſſembly; for that expreſſly requires the principal intereſt and coſts. *Barret &co.* vs *Tazwell*, 1 *Call*, 215. Parol evidence was not admiſſible to add to, or explain, a record; but, if, otherwiſe, the nature of it ought to have been ſhewn.

RANDOLPH in reply. The act of Aſſembly ſays, that the penalty ſhall be diſcharged by payment of the principal and intereſt; and therefore the coſts are not neceſſary to be tendered. In general, a tender is matter *in pais*, and ſo pleaded: But this was the caſe of money offered into court; and therefore might be uſed, in evidence, as matter of record, without the plea. No rule of court was neceſſary. The money was paid into the hands of the public functionary, and, as the plaintiff did not receive it, he ought to bear the loſs. The parol evidence ought to have been received, as it was the beſt the nature of the caſe was ſuſceptible of.

Cur. adv. vult.

PENDLETON Preſident delivered the opinion of the court as follows:

The queſtion depends on the firſt judgment of the Diſtrict Court, in October 1796, reverſing that of the county court; ſince, if that reverſed was right, there is no objection to the ſubſequent proceedings in the Diſtrict Court. In the county court the defendant pleaded a former ſuit, which had been commenced, by Minor the teſtator of the plaintiff, againſt the teſtator of the defendants in the ſame county court; in which ſuit, at a court held for the ſaid county in Auguſt 1770, Robinſon pleaded a tender of the debt, now ſued for, and did, then and there, tender into court, and pay into the hands of the clerk, the principal & intereſt due thereon; which the defendants ſuppoſe has been always, and now is ready, to be paid

to Minor, or the plaintiffs; and upon this plea the parties were at issue. On the trial, of the cause, the defendants produced the record of the former suit, and offered parol testimony to prove that the money was actually paid to the clerk, at the time of filing the plea; when the counsel for the plaintiff moved the court to instruct the jury, 1. That unless they found that the costs as well as the principal and interest, had been brought into court, they should find for the plaintiff; 2. To disregard the parol testimony introduced to prove the payment of the money into court, this being a fact which should be proven by record. The court refused to instruct the jury, who found a verdict for the defendants, for whom a judgment was entered, and the question is, whether the court ought to have given the instruction required? As to the first point, the costs, Mr. Randolph was right upon the act of Assembly that the costs were not required to be paid into court; but this is not a case within that act of Assembly, but a plea of a prior tender accompanied by the money tendered, and therefore we are only to consider of the propriety of admitting the parol testimony. By the law, a plea of tender is not to be received without the money tendered, which must have been filed and paid into court, where all the pleadings, at that day, were carried on. It is therefore to be presumed, *prima facie*, that the money accompanied the plea; especially, as the plaintiff did not demur to, but joined issue on the plea, and the clerk having omitted to enter the payment, parol proof ought to be admitted, in aid of that presumption, since it does not tend to contradict the record, but to supply a defect, which the clerk, either through mistake or design, omited to enter; circumstances which in this case render the parol testimony admissible. Therefore the judgment of the District Court, in October 1796, and all subsequent proceedings in the said court, are to be reversed, with costs, and this court proceeding to give such judgment, as the said District

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Court ought to have given in October 1796, the judgment of the county court is affirmed, with costs.

HENDERSON, *against* FOOTE.

To what period the plea of *non assumpsit*, within five years, relates; whether to the time of the suit, or to that of pleading the plea.

Foote conversations of the executor are not sufficient to raise an *assumpsit*.

The court thought it unnecessary, in this case, to decide whether a declaration, founded on an *assumpsit* by the testator, could be supported by evidence of an *assumpsit* by the executor; because the conversation of the executor was too loose, to raise an *assumpsit*.

GLASSFORD and HENDERSON brought *assumpsit* against Fitzhugh and wife, ex'rx. of Foote, and declared, 1. For goods, wares and merchandizes sold and delivered to Foote. 2. On a *quantum velibat* for the same. 3. For money paid and advanced for Foote. 4. For money had and received. Plea *non assumpsit*, and *non assumpsit* within five years.—Issue. Upon the trial of the cause, the defendant filed a demurrer to the evidence, which states, That the plaintiff, in order to maintain the 1st and 2d count, gave in evidence, that Fitzhugh had understood there was a considerable debt, of between two and three hundred pounds, due from Foote to the plaintiffs; and that, at the time when Foote made his will, there was some conversation about the quantum of legacies to be given his daughters; and Mrs. Foote observed there was very little due, except a British debt, but the witness did not understand that Fitzhugh was present, at the making of the will. That Fitzhugh said the reason, why he had not given up some of the slaves, was that he held them until it was determined, whether the said debt was to be paid; that he believed it to be just; that he had found the account in the house; and was willing to pay his own part of it, but the legatees, who were sanguine that the plaintiffs could not obtain judgment, were determined to take every advantage; and that Foote died about the year 1778. The jury found a verdict, subject to the opinion of the court upon the demurrer; and the

court gave judgment for the plaintiffs. Whereupon the defendants appealed to the Diſtrict Court; where the judgment was reverſed; and, from the judgment of reverſal, the plaintiffs appealed to this Court.

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Botts for the appellant. The iſſue was immaterial. For the plea is non aſſumpſit generally, and not that the defendant did not aſſume at any time within five years, next before the inſtitution of the ſuit; ſo that the plea relates to the time of pleading. But, although the defendant might not have aſſumed within five years before the time of pleading, yet he might have aſſumed within five years, next before the commencement of the ſuit. Of courſe it was immaterial, whether he had aſſumed within five years next before the time of pleading, or not; for it did not embrace the eſſential queſtion in the cauſe. *Smith* vs *Walker* 1 *Wash.* 135. It follows, therefore, that a repleader ought to have been awarded; and that the judgment is erroneous, in having omitted to order it.

But, upon the merits alſo, the judgment is erroneous. It is a rule that the ſlighteſt aſſumpſit will be ſufficient to take a caſe out of the operation of the ſtatute of limitations: And, as the executrix might have aſſumed herſelf, her huſband might do it for her. In fact he did; at leaſt a jury might have infered it from his converſations: And then the demurrer to evidence admits it; becauſe a demurrer to evidence admits every fact, which the jury might have infered. Beſides ſlighter evidence will be ſufficient to revive a promiſe, after the five years, than is neceſſary to prove the original promiſe. Thus, if an executor publiſhes, in the news papers, for creditors to make known their debts, and receive payment, it will be conſtrued into an aſſumpſit. which will revive the promiſe.

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RANDOLPH *contra.* The general plea will refer to the commencement of the ſuit; and therefore the true queſtion is covered by it. The plaintiff has not proved any expreſs aſſumpſit. The huſband did not mean to bind himſelf, or the eſtate, in the caſual converſation ſtated in the record. He, merely, ſaid that he had underſtood there was a balance due. But this was a looſe declaration, uttered ſeveral years after the teſtators death, and not made to the creditor himſelf. Therefore it was not obligatory. *Taliaferro* vs *Robb.* 2 *Call.* The evidence, however, was irrelevant; for the promiſe is laid, in the declaration, to have been made by the teſtator, and this is attempted to be ſupported, by evidence of a promiſe by the huſband of the executrix. So that the *allegata* and *probata* do not agree together.

BOTTS in reply. The caſe of *Smith* vs *Walker* is expreſs, that the general plea will not do; and therefore the iſſue is immaterial. It is no objection that the promiſe is laid to have been made by the teſtator; for the evidence was, nevertheleſs, admiſſible; and bound the eſtate. 1 *Morg. Eſs.* 340.

Cur. adv. vult.

PENDLETON Preſident delivered the reſolution of the court as follows:

In June 1796, the appellants, as ſurviving partners of Glaſsford and company, commenced an action on the caſe againſt John Fitzhugh and Margaret his wife, as executors of Richard Foote, in the county court of Prince William. The declaration contains four counts: 1. An *indebitatus aſſumpſit* for goods ſold and delivered to the teſtator by John Riddle, factor for the plaintiff. 2. A *quantum valebat* for the ſame. 3. For money advanced. 4. For money had and received to the uſe of the plaintiffs. All the promiſes being laid

to be made by the teſtator: the defendants pleaded *non assumpsit;* and *non assumpsit* within five years: On which the parties were at iſſue. Upon the trial of the cauſe, the plaintiffs, in order to prove the 2d iſſue, gave in evidence, "that John "Fitzhugh, the defendant, frequently ſaid, in the "year 1792, and ſince, that he underſtood, there "was a conſiderable debt, of between two and "three hundred pounds, due from Foote's eſtate, "to the plaintiffs, that, he had underſtood, alſo, "that when Foot made his will, on a converſation "between him and others about the quantum of "legacies to be given to his daughters, Mrs. Foote "his then wife, obſerved there was very little "due, except a Britiſh debt. That Fitzhugh, "alſo ſaid, that he held ſome of the ſlaves of "Foote's eſtate, until it was determined, whether "this debt was to be paid. That he believed the "debt to be juſt, and he found the account in the "houſe, and was willing to pay his part of it: "That the legatees and ſons of Foote were deter-"mined to take every advantage, and were ſan-"guine in their expectations that the plaintiffs "could not recover; and it is ſtated that Richard "Foote died about the year 1778." The defendants demurred to this evidence, as inſufficient to maintain the ſecond iſſue, on the part of the plaintiffs; the plaintiffs joined in demurrer; and the jury found a proviſional verdict for the plaintiffs, for £369 17 10, ſubject to the opinion of the court, upon the demurrer. The county court gave judgment for the plaintiffs; and the defendants appealed to the Diſtrict Court, where the judgment was reverſed: Whereupon, the plaintiffs appealed to this court. It was inſiſted, by the appellants counſel, that the iſſue joined upon the ſecond plea, was an immaterial one, ſince *non assumpſit* within five years might apply to the time of the plea, which might be true, and yet he might have aſſumed within five years before the commencement of the ſuit, the true inquiry upon the iſſue; and the opinion of the court, in the caſe

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of *Smith* vs *Walker*, 1 *Wash.* 135, was relied on. In that case (a complication of errors) the court did say, that, strictly, the non assumpsit within five years must refer to the time of the plea. The inference drawn from it, is not mentioned, nor is it further taken notice of; however, the conclusion, now drawn, we think would be right if there was nothing in the record to shew that, if it had been properly pleaded, the decision of the issue must have been the same; But, it being stated, that Foote died in 1778, eighteen years before the suit was brought, it was impossible that he could have promised within the last five years, of those eighteen, unless he had come from the grave to make such promise. On this head, therefore, the issue was materially determined. It was objected by the appellees counsel that the promise of Fitzhugh, if binding, ought to have been declared on, and could not have been given in evidence: To repel which, the appellants counsel relied on 1 Morgans essays 340, as proving that, upon a declaration laying a promise made to a testator, the plaintiff may give in evidence a promise made to the executor within time. Without considering this, which is contradicted in other books, or whether there may not be a difference in such a case between a promise made *to* and one made *by* an executor, which the court think unnecessary to decide, we are of opinion that, in this case, the loose conversation of Fitzhugh, even if he had been the executor instead of being only the husband of the executrix, would not have operated either as a new promise, or as an acknowledgment, so as to revive the debt. It is plain, from the whole evidence, that he did not intend it should have any such force; since, at the time, he said he believed the debt to be just, and that he was willing to pay his part, he declared that the others concerned were determined to dispute it, and, that he held slaves it his hands untill it was determined, whether the debt was to be paid.

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We are, therefore, of opinion that the Diſtrict Court did not err in their judgment, ſo far as it went; yet we are obliged to reverſe it, becauſe it was incomplete in not entering ſuch a one as the county court ought to have given. It is therefore reverſed with coſts, and a perfect judgment, ſuch as there ſhould have been, is to be entered; that is to ſay, that the judgment of the county court is erroneous and reverſed with coſts, and judgment entered for the defendants.

JONES, Executor, &c.
againſt
WATSON.

After two references before commiſſioners appointed by the county court, to ſettle an adminiſtration account, and one reference to a commiſſioner of the High Court of Chancery, no exception, for the want of credits, will be allowed here, which was not made at one of thoſe examinations.

WILLIAM WATSON brought a bill in chancery againſt Richard Jones and Littlebery Royal, executors of Richard Jones deceaſed, ſtating, that William Watſon the plaintiffs father deviſed a tract of land to the plaintiff, who was an infant. That Richard Jones, Edward Jones, and Daniel Jones were appointed executors of the will; that Edward is dead, and no account of his adminiſtration has been rendered. That the profits of the lands were conſiderable. That Richard Jones was the acting executor, and that he alſo acted as guardian to the plaintiff, but has not rendered any account of his tranſactions in either character. That the plaintiff has only received £64 from the eſtate. That ſince the death of the ſaid Richard Jones, commiſſioners, appointed by Amelia court in 1786, have found a balance due from the ſaid Watſon's eſtate to the ſaid Richard Jones of £102 0 1. That the plaintiff had four ſiſters, who had lands and ſlaves deviſed them by their father, and therefore, if the balance was due, they ought to contribute their proportions, which would leave the plaintiff only chargeable with a *fourth*,

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that is to ſay £25 10 0¼. That the ſaid balance however is not due. That it would not have been ſuffered to have lain ſo long if it had been due. That ſince the death of the ſaid Richard Jones, the defendants have ſued the plaintiff for £42 18 8¾ in Amelia court, on account of the ſaid balance; the laſt debit of which is in the year 1770. That the ſuit was refered to commiſſioners, who, as the plaintiff did not attend on the ſecond day, awarded the ſaid £42 18 8¾ againſt him. That a month was allowed the plaintiff to ſhew diſcounts; but on the day appointed by the plaintiff, one of the commiſſioners was neceſſarily called off. That, before the ſucceeding court, the plaintiff called on the defendant with his witneſs, and the certificate of one Wootten, which the defendants agreed ſhould be evidence, but alledged, that the month was out, atd that he would proceed to get the money. That thereupon the plaintiff obtained a ſuperſedeas to the judgment; which was affirmed, in the abſence of the plaintiffs attorney. The bill therefore prays for an injunction, an account of Watſons eſtate, and for general relief.

The anſwer ſtates, that the teſtator, in 1774, deſired the defendant to ſtate his adminiſtration account for him; that he undertook it, but was prevented by his own buſineſs, until after the teſtators death in 1778. That after the war was ended, the defendant applied to the plaintiff and Thomas Williams, who had married one of the plaintiffs ſiſters, and requeſted them to conſent to have commiſſioners appointed to ſettle the accounts; which they agreed to; and thereupon Amelia court made an order for that purpoſe. That in January or February 1786, the commiſſioners, in preſence of the parties, examined the accounts, but in conſequence of an objection raiſed by the plaintiff, they did not finiſh: However, with the conſent of the plaintiff, they appointed the 6th of March following, when, the plaintiff not appearing, they reported £102 8 1 due his teſtator from Watſon's eſtate, on account of monies furniſhed

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Munford, and the plaintiff. That the plaintiffs proportion thereof was £42 18 8¾—That upon application for payment, the plaintiff ſtarted an objection, that Edward Jone's adminiſtration account had not been ſettled; whereupon the defendant brought ſuit, which was refered to commiſſioners, who reported the ſame balance; and the defendant ſaid he was contented therewith. But, he growing diſſatisfied ſome time afterwards, the defendants agreed to another reference, on condition, that there ſhould be no appeal; that the next referees made the ſame report, and that the plaintiff had notice of the time and place of their meeting, but did not attend: In conſequence of which, when the judgment on the award was entered up by Amelia court, the defendants agreed to allow the plaintiff a month to ſhew his diſcounts, which he failed to do. That Wootton's evidence was before the laſt commiſſioners, and the defendant believes the award to be juſt.

CALL for the appellant. There had been ſeveral ſettlements by commiſſioners and referees under orders of the court: After which, according to many deciſions here, the appellee ought not to have been allowed to diſturb the tranſactions, or unravel the accounts. It will be no objection, that the appellant agreed to allow a month for ſhewing diſcounts againſt the laſt judgment; for that merely related to diſcounts, and not to a right of overhauling the account itſelf. The diſcounts have been applied by the commiſſioner, for Dyers and Sweeneys rents for the ordinary, are credited in the report; and as to thoſe for the lands, they are all accounted for, as appears by the account, except thoſe incurred during the time that Edward Jones was the acting executor. Therefore if the Court of Chancery could interfere, after the orders of reference, the juſt credits have been given, and a balance of £16 ſtill left in favour of the appellant; who is entitled to intereſt thereon, according to a former deciſion of the court in *Jones* vs *Williams*, 2 *Call* 102.

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DUVAL *contra.* The executor advanced the infants more money than the amount of the profits of the estate, which was wrong. The daughters are credited for £75 profits of the estate, although the lands belonged to the son. In that respect therefore the referees first, and the commissioners afterwards, proceeded on an erroneous ground.

CALL in reply. The over payments to the appellee arose from the advances of the £60 and £14 after he came of age; and therefore the objection fails. As to the profits, they probably proceeded from keeping the slaves together, and each childs drawing its share. At any rate, the appellee ought not to be allowed to take an exception upon that ground now; because no objection was made, upon that score, either before the referees, the commissioner, or the Court of Chancery, where it might have been answered; but it is not fair to object to it, in this court, after omitting it in the court below; because, as no objection was made on the former occasions, the appellant had a right to conclude that none would be raised afterwards; and the presumption is, that it was satisfactorily accounted for, at the former investigations.

Cur. adv. vult.

PENDLETON President. The subject of this dispute was before the court in October, 1799, in the case of Jones against Williams another residuary legatee in Watsons will. The neglect of the executors, in not accounting from 1752 to 1786, was then, as now, complained of, for which some apology was then suggested and approved by the court, from the supposed confidence which the legatees had in their uncles the executors, whose accounts the children, probably, as they came of age, examined, received their estates, and were satisfied: And the rather, since Edward, the on-

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ly acting executor for ſix years, never rendered any account, nor does it appear that they ever required ſuch account, or were diſſatisfied about it. Indeed it does not ſeem, that either Williams, or Watſon, ever called on Richard to account, but, both having contrived to get more than their ſhare from him, it became neceſſary for Richard's executors to make up the account of his adminiſtration of Watſon's eſtate, in order to recover back what had been overpaid. Accordingly, in 1785, by conſent of thoſe executors and Williams and Watſon, an order of the county court of Amelia was made, appointing commiſſioners to ſtate and ſettle that account, which, in March 1786, was returned and ordered to be recorded; making a balance, due from Watſons eſtate to Jones's, of £102 8 1. Watſon being charged with his proportion of that balance, and his private account ſtated, a balance remained due from him to Jones's eſtate, of £42 18 8; which it is ſuppoſed he aſſumed to pay, but neglected it; and, in May 1787, Jones's executors brought a ſuit at law to recover it, which ſuit was afterwards, in March 1790, refered to arbitration, and an award returned in March 1791, in favour of the plaintiffs for the £42 18 8; but, on Watſons motion, and the plaintiffs conſent, it was refered back to the arbitrators to be reconſidered; and, in May 1792, the arbitrators reported, that Watſon had failed to attend them; and, that they had re-examined the account and vouchers, and diſcovered no reaſon to change their former award: Upon which, judgment was entered for the plaintiffs; but, even then, he had one month allowed him to ſhew any further juſt diſcounts; which he never brought forth. In June, a writ of fieri facias iſſued, which was executed, and a forthcoming bond taken. In March 1793, that executiou and bond were quaſhed, a new execution iſſued, in April, which was alſo executed, and a forthcoming bond taken, on which bond judgment was entered, in May, for £65 10 11, with coſts. In June, Watſon obtained a ſuperſedeas to that judgment, which was affirmed in the

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District Court, finally, in September 1795: And in March 1796, he obtained an injunction, on filing the preſent bill. Upon the hearing, the Chancellor refered it to a commiſſioner to examine and report upon the accounts; who ſays that, after being attended by the parties, hearing their ſeveral allegations, examining their papers, and adjourning for time to procure further teſtimony, he had ſtated an account between them, reducing the balance, due from Watſon's eſtate to Jones's, to £16 2 9, excluſive of intereſt. To this report exceptions are filed by Watſon, ſuggeſting that it appears, by the depoſitions, that ſeveral tenants lived on Watſons land, whoſe rents are not credited in the account. The final decree makes the injunction perpetual againſt the whole judgment at law, and awards Jones's executors to pay the coſts, from which the appeal is entered.

On what ground the Chancellor diſallowed the balance of £16 2 9, and perpetuated the injunction for the whole, the court are not able to diſcover. If it was upon the ſuppoſition that rents to that amount had been received and not accounted for, it is obſerveable that various rents are credited, and it does not appear in proof that any more were received by Richard Jones; and conſidering that Watſon had ſo many opportunities, from the year 1785 to 1796, to bring forth proofs of any credits omitted, before the auditors in the country, the arbitrators, and the chancery commiſſioner, it is preſumable he has brought forth all he was able to diſcover, and very unreaſonable to make the executor chargeable upon grounds merely ſuppoſititious; and to add to thiſ ſeverity the executors are charged with coſts in equity; the neceſſity of applying to which court was occaſioned by Watſons own neglect.

The court therefore reverſe the decree with coſts and diſſolve the injunction as to £16 2 9, with intereſt from the firſt of May 1787, and all

the costs of common law, as well in the District as county court, exclusive however of the damages awarded in the District Court on the affirmance of the judgment, and the injunction to stand and be perpetual as to the residue, and the parties are to bear their their own costs in the Court of Chancery.

Jones, *vs.* Watson.

JOHNSON,
against
BROWN.

THIS was an appeal from a decree of the High Court of Chancery. The bill states, that on the 20th of November 1749, William Davies, for his father Robert Davies, entered with Thomas Lewis, surveyor of Augusta county, for 300 acres of land *between his father's land and the widow Bell's*. That on the 29th of August 1753, Robert Davies sold the entry to J. Phillips; from whose son and heir, the plaintiff purchased it on the 23d of May 1789. And on the 12th of October 1789, William Davies also assigned it to the plaintiff, for the consideration of £ 4 10. That the entry being surveyed, and the plat returned into the Land Office, a patent issued thereon June 9th, 1792. That John Brown in 1753, entered, with the same surveyor, 230 acres of land, com-

Where equity is equal, the law must prevail.

If A. have such an equity as would, on a *caveat* prior to the grant, have entitled him to a preference, it would be no ground for a bill to set aside the patent, unless he was prevented by fraud, or accident, from prosecuting a *caveat*.

The entry is not a *legal* title; but is only the first step towards acquiring *waste* lands.

The survey is only a progressive legal step, but it is the *grant* only, which passes the legal title

There.

There are periods after which the court will presume notice by the surveyor, and a dereliction of the entry, by the party.

A survey annexed to the record, and not excepted to in the court below, will be considered as admissible evidence in this court: The more especially, if accompanied by the surveyors deposition.

Quere: Whether the entry in this case was too vague?

If the lands surveyed be not within the description of the entry, a subsequent locator shall not be postponed, by the lands thus surveyed at a time future to his entry and survey, especially if he has obtained a grant.

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prehending 190 acres of that above mentioned; and, in 1783, a patent for the same was obtained by his heir or devisee, from whom the bill prays a conveyance. The answer says that two surveys can not be made on one entry; that, if the plaintiffs survey had pursued the entry, it must have gone through patented lands; that the entry is too vague: That the plaintiffs survey was forfeited, and could not regularly have been surveyed, when it was.

There are several depositions with regard to the plaintiffs purchase; and the deposition of Poage a surveyor, stating that he had run certain lines; and annexing a plat comprehending the lands in controversy.

The Court of Chancery decreed in favour of Brown; and thereupon Johnson appealed to this court.

RANDOLPH for the appellant. The government could not have defeated Johnstons right; because, by the act of 1748, all entries were to stand good until notice was given by the serveyor, on two court days. *Old edit. laws* 220 §. 20. But Brown cannot be in a better situation than the government itself. The vagueness of the entry is not material. For the officer was satisfied, and all the entries of that day, were as vague. The survey agrees with the entry, for a line run from it will touch the widow Bells, as the plot exhibited by the appellee shews: But the plot itself is not authentic, as it was not made under any order of court.

NICHOLAS *contra.* Having got the first patent, we have the legal right, and the plaintiff shews no equitable title to overthrow it, as there is no charge of any fraud in obtaining it, which there must be in order to affect the legal title. *White* vs *Jones*, 1 *Wash.* 116. We had no notice af any prior entry, and therefore our conduct could not

be fraudulent. But the entry is too vague, *Hunter vs Hall*, 1 *Call* 206; and it is not material that it was under the old law.

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The plot is evidence; for it is proved by the ſurveyor; and was not excepted to in the Court of Chancery. Therefore no objection to it ſhould be allowed at this time. But, if the plot be received, then it is manifeſt that Johnſton did not purſue the entry in his ſurvey; and therefore the ſurvey itſelf is void as againſt us. But the entry was abandoned; for the lapſe of time was ſo great that a relinquiſhment ought to be preſumed, *Picket* vs *Dowdel*, 2 *Wash.* 106. Beſides the evidence proves, that Davis had forgot that he ever made the entry.

CALL on the ſame ſide. The entry was too vague to operate againſt a ſubſequent locator, without actual notice: And it will not be material, if no act of Aſſembly, at that day, required as much preciſion, as the preſent laws do. For the act of 1779 only enacted into a ſtatute, what was a law of equity before, as far as reſpected a ſubſequent locator; becauſe it was a principle of general juſtice, that a vague and indefinite entry, from which no particular portion of land could be aſcertained, ought not to prevent, or diſappoint, a future locator: Otherwiſe every man who wiſhed to make an entry, muſt have conſulted every prior locator, before he could have proceeded; which would have been an intolerable hardſhip.

It is under this veiw, therefore, that we ſay the entry is void; and not that it is *ipso facto* nullified againſt the public, or any other perſon. For as againſt the public the act of 1748 *(old edit. laws* 220*)* may have full operation, and yet be void againſt a ſubſequent locater, without knowledge of the particular place entered for.

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This doctrine is attended with no inconvenience; becauſe it was in the power of the firſt locator to have been more preciſe, or to have ſurveyed at an earlier day: Whereas, according to the other idea, an immenſe ſpace of country might have lain unappropriated half a century, until ſome prior locator was ſatisfied.

Hence it appears, that, where there was conflicting entries, preciſion was as neceſſary before the act of 1779, as afterwards.

Let us examine, then, what has been held an inſufficient entry ſince that act.

In *Hunter* vs *Hall*, 1 *Call* 206, an entry of 400 acres on the ſouth branch, adjoining Lord Fairfax's land, at the mouth of Mill creek, was held inſufficient; and yet that entry was, fully, as certain as this.

Field vs *Culbraith*, 2 *Call* 547, was not like this: 1. Becauſe it was for *all* the vacant land between certain lines; whereas this is, only, for 300 acres in an immenſe ſpace. 2. Becauſe the ſurvey, there, had reduced the location to certainty before the *caveat*. 3. Becauſe the ſurvey was upon the land deſcribed in the entry, and two of the lines actually agreed.

Upon the ground of preciſion, therefore, the entry, as againſt Brown, who was an innocent man, is clearly void, on account of the vagueneſs of it.

But the ſurvey does not agree with the entry:

For the land ſurveyed does not lie between thoſe of Robert Davies and the widow Bell; but it lies behind thoſe of Robert Davies.

When a man deſcribes a tract of land, as lying between two others, he means, that the body of

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it, at leaſt, actually lies between them. A mere corner, or mathematical point, will not ſatisfy the deſcription. But, in the preſent caſe, however, not even a mathematical point lies between them; for the land ſurveyed is not comprehended between thoſe deſcribed in the entry, but lies behind one, and recedes from both. So that, in the language of one of the judges in *Hunter* vs *Hall*, it may be ſaid, that Davies, when he entered, never expected to find the land he entered for, at the place which has been ſurveyed.

But the entry was abandoned:

It was made in 1749, and no ſurvey of the land took place until 1790, upwards of forty years. Therefore, according to *Picket* vs *Dowdel* 2 *Wash.* 106, it was utterly void againſt a ſubſequent locator. For the rules there laid down expreſsly apply to the preſent caſe. Becauſe the warrant of Lord Fairfax was like that of the government, and he was as much bound by it. Of courſe, if the new grant could ſuperſede the old entry and ſurvey there, much more will it ſuperſede a mere entry here.

But our caſe is ſtronger; becauſe there is actual evidence here of the abandonment. For Perry ſays that Davies appeared to have no recollection of it; which is a clear proof of his having long ſince relinquiſhed it; and Moffet ſays, that Phillips offered to give it for nothing, into a bargain which they were treating about: A clear proof that he alſo had abandoned it.

But by analogy to the three years after the patent before ſeating and planting, the failure to ſurvey, patent, and improve, ought to be held a dereliction. Elſe other locators might have been put to inconvenience, and the public defrauded of the taxes.

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But, for another reason, the defendant must succeed: For he has got the legal estate, without any fraud; and his equity is at least equal. Therefore a court of equity will not interpose between two innocent men, but will let the law prevail.

The survey is evidence; for the correctness of it has never been impeached before; and an order for a survey is never made without the request of the parties. But Poage swears that it is correct; and, as he might have described the situation in words only, without the assistance of lines, it can never be an objection, that he used lines to make himself better understood. Besides this is a mere plat, composed of copies from his office; and if the copies could be read, so may the connected plat of them also.

But the plaintiff shews no title.

He does not shew any assignment of the entry from Robert Davies to Phillips, or from William Davies to himself. Neither does he produce any patent, or authority for making the entry.

RANDOLPH in reply. The record is probably defective. At all events there is reason to presume the assignment and patent to Johnson; and the court will institute an enquiry to ascertain it. William Davies is stated to have assigned himself, with a knowledge that his father had previously done so. The entry is as certain as most of that day; indeed it would be precise enough at this:— *Field* vs *Culbraith*, 2. *Call*, 547. As to the lapse of time, it is no objection, as the act of 1748 preserves the entry, until the surveyor gives the required notice. In this respect it differs from *Picket* vs *Dowdell;* because there was no such law, or private regulation, for the government of Lord Fairfax's office. But the doctrine, in *Johnston* vs. *Buffington*, 2. *Wash.* 116 is in our favour. There was no necessity that the whole land should lie be-

tween the tracts of Davis and Bell; and lines might be so run, as to throw part between them. The analogy contended for, between this and the three years after the patent cannot be maintained; such a position has never been laid down by the court, in any case. The objections, to the evidence of the survey, cannot be obviated; and upon the whole the decree is erroneous, and ought to be reversed.

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Cur adv. vult.

PENDLETON President,— (after observing that as all the judges who sat in the cause were unanimous; those present, thought there would be no impropriety in proceeding to judgment in the absence of Judge Roane,) delivered the resolution of the court as follows:

Upon the 20th of November 1749, William Davies entered with the surveyor of Augusta county, for 300 acres of land, *between Robert Davies's land and the land of the widow Bell.* It is stated that Phillips purchased the entry of Robert Davies in 1753, and sold it to Johnson in 1789. Of this, however, no proof is exhibited; but let it for the present be admitted, without making it a precedent. It is proved that, in October 1789, Johnson purchased of William Davies his right to this entry, and be it also admitted, as stated, that he surveyed the land, in dispute, under that entry in 1790, and obtained a grant in 1792. In January 1753, a survey apppears to have been made, for John Brown grand-father of the appellee, of 230 acres, including the lands in dispute, on which it is said a patent issued in 1783, but it does not appear. Upon the 10th of June 1770, Thomas Brown, father of the appellee, entered 400 acres, adjoining Phillips, his fathers old tract, and his own land. March 1st 1775, he surveyed the 190 acres in dispute, correctly answering the description of his entry; and February 1st 1781, obtain-

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ed a grant for it. The preſent ſuit in chancery was brought by Johnſon, ſtating his equitable title to be prior and ſuperior to Brown's, and praying a decree that he may convey the legal title. The bill was diſmiſſed in chancery, and from that diſmiſſion the appeal comes.

We firſt conſider the caſe, on general principles, as a claim to ſet up an equitable intereſt in oppoſition to a legal title; in which caſe, the plaintiff, to ſucceed, muſt ſhew a ſuperiority of equity to the defendant, for, if it be equal only, the law muſt prevail.

We then contraſt the equity of the parties:

Brown appears to have proceeded regularly, fairly and legally, to acquire a title to vacant lands, and has, without fraud, obtained a patent. Johnſon, on the other hand, appears to be a man ſearching for defects in his neighbors land titles; hunting up, and purchaſing a ſtale, dormant claim, in order to diſturb that title; and would rather ſeem to merit the penalty of the act againſt buying pretenſed titles, than to be conſidered as a fair claimant in a court of equity. In this view then here is *no equity*, ſet up againſt *law* and *equity*, and cannot prevail.

But let us ſuppoſe Johnſon had ſuch an equity, as would, on a *caveat* prior to the grant, have entitled him to a preference; it would be no ground for a bill to ſet aſide the patent, unleſs it had been ſuggeſted and proved, that he was prevented by fraud or accident, from proſecuting a *caveat*. On thoſe grounds, this court has ſuſtained bills of this ſort, and enquired into the equitable preference, as if on a *caveat*; but to admit ſuch bills in all caſes, without even ſuggeſting an excuſe for not having entered a *caveat*, would be to tranſfer the whole *caveating* buſineſs from the courts of law, where the legiſlature have placed it, into the

chancery; which this court cannot give ſanction to. It was foreſeen by the legiſlature that there would be interfering entries and ſurveys; and the caveat was the remedy for ſettling all thoſe diſputes prior to the patent, to avoid the inconvenience of that ſolemn inſtrument being involved in conteſts of that kind.

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But we will gratify the plaintiff, as far as to ſuppoſe for the moment, that we were ſitting in judgment on a caveat, entered by Johnſon againſt Brown to prevent the patent on his ſurvey of 1775: Here Mr. Randolph inſiſted, that the entry gave a legal title to the land: If ſo, why come into a court of equity? But it is not correct to ſay, the entry gave a legal title. An entry is the firſt legal ſtep towards acquiring waſte lands, and gives the perſon making it, if properly purſued, a preference to a grant, the true definition of an equitable intereſt. The ſurvey is a progreſſive legal ſtep, but it is the grant, only, which paſſes the legal title. However, the counſel inſiſted that the title, whether legal or equitable, was to ſtand good, at all times, until notice given by the ſurveyor, and a neglect on the part of the perſon making the entry: Which does not appear to have occured in the preſent caſe. But is there no period after which ſuch notice, and a dereliction of the entry, ſhall be preſumed? The law books abound with inſtances of ſimilar preſumptions; and we believe, that not a precedent, or reaſon, can be found, to induce a court of equity to give its aid to reſuſcitate an entry, which has ſlept for forty years, in order to diſturb intervening legal titles fairly obtained.

Again: To cloſe the climax of defect in the plaintiffs claim, the entry gave no title, at any time, to the land in diſpute: Which will appear by reccurring to the ſurvey annexed to the record. That ſurvey the court think admiſſible, not only as it comes to us as a part of the record, without exception, but becauſe it is authenticated by the ſurvey-

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ors depoſition. Without enquiry whether the entry was too vague, *between Davies and Bell*, or whether two diſtinct ſurveys could be made upon one entry? It is moſt obvious, that the land in diſpute is not within the deſcription of the entry, ſince it does not lie *between Davies and Bell* The counſel ſuppoſed that if a line were drawn, from Davies's corner at B to Bell's at K, it would throw part of the land in diſpute between the extreme points of that line, and ſatisfy the entry. This was ingenious, but not rational; ſince as Bell's land lay to the North weſt of Davies's, the entry muſt have the ſame poſition from Davies; and therefore it cannot be juſtifiable to go to the South eaſtern corner of Davies's land, in order to diſcover the ſpace between that and Bell's, which would throw Davies's land between the entry and Bell's, inſtead of the entry lying between the other two. Surely to draw lines from the extreme corners and lines of Davies to thoſe of Bell, in the parts where they approach each other, is the way to diſcover the ſpace between them: For inſtance, the lines D, E, and E, F, of Davies, and the lines J. K, of Bell, are the approximating lines: Then draw a line from D, or E, to K, and from F, to J, thoſe lines will ſhew the ſpace between thoſe lands, and be the limits of the entry, which will not include a foot of the land in diſpute. On every point therefore, and every view of the caſe, the court are unanimouſly, and without difficulty, of opinion, that the decree is right, and ought to be affirmed, with coſts.

ELLIOTT'S Ex'rs. *againſt* LYELL.

Where a joint bond was given before the act of 1786, & after that act went into operation, one of the obligors died, living the other, the obligation ſurvived, and the executors of the deceaſed were exonerated.

IN the year 1798, Lyell, as aſſignee of Pariſh, brought debt againſt Robert Elliott executor of Richard Elliott, upon a joint bond given by the

said Richard Elliott, Thomas Butler, and William Walker to Parish, on the 17th day of October 1782, and assigned by Parish to the plaintiff—Plea. *Payment*, and issue. Upon the trial of the cause, the defendant filed the following bill of exceptions, "the plaintiff offered in evidence to support the issue on his part, a bond in these words, *(Know all men &c. setting it forth:)* To which "the defendant excepted, and applied to the court "to instruct the jury whether the action against the "defendant, as executor of Richard Elliott deceased, under the law is maintainable or not, and "if not, that they should find for the defendant, "but the court being of opinion that, as the testator "Richard Elliott is admitted to have died since the "commencement of the act *concerning partitions "and joint rights and obligations*, passed in the year "1786, his representatives are by that act made "chargeable upon the said obligation, tho, joint, "in the same manner as such representatives "might have been charged, if the obligors had "been bound severally, as well as jointly, refused to instruct the jury accordingly." Verdict and judgment in favour of the plaintiff; and the defendant appealed to this court.

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HAY for the appellant. The question is, whether, as the bond in this case was joint, the obligation, as to Elliott, did not expire with his death, so that no action can be maintained against his executors, notwithstanding he survived the act of 1786, *concerning agents rights and obligations?* At common law the executors of one joint obligor were clearly discharged by his death, living the other obligor; and, as the bond in this case was given prior to the act of 1786, the situation of the parties was not varied by that law; which only affected subsequent bonds. The principle contended for, is established by the decision of this court in the case of *Craig* vs. *Craig*, 1 *Call*, 483.

April 1802.

ROBERTSON *contra*. After the case of *Field* vs. *Harrison*, 2. *Wash.* 136, and *Richardson* vs.

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Johnston, 2. *Call*, 527, I ſhould not have contended in favour of the judgment of the Diſtrict Court, if I did not conceive there was a manifeſt diſtinction between the caſes: In both thoſe, the obligor died before the act of 1786, but in this he ſurvived; and, from that circumſtance, reſults a difference, which ſupports the judgment of the Diſtrict Court. For, upon this ſtate of the caſe the act merely operated as a modification of the remedy, and not as a creation of a right; becauſe both obligors having ſurvived the act, and being each liable to the creditor, the Legiſlature might very properly give a new mode of enforcing it. So that it was ſtill the old right, with a new remedy: which it never has been denied the Legiſlature might afford, if there was no variation of the right. The caſe of *Craig* vs. *Craig* is not like this; for, there the action was not commenced, when the act of 1795 took effect.

RANDOLPH on the ſame ſide. The nature of the contract was not changed, but the law, as to that, remained as it was before; and, only, a new remedy was given: For the obligation was in continuance at the time of the act; and, therefore, there could be no impropriety in making his executors liable. Both parties muſt have intended, at the time of making the bond, that there ſhould be a payment of the money at all events, and that the death of one of the obligors ſhould not vary the right, or exonerate his executors. None of the caſes, decided in this court, are repugnant to what we contend for.—*Turner* vs. *Turner's* executors, 1. *Wash.* 139, was an expreſs creation of a right; and in *Field* vs. *Harriſon*, the obligor died before the act of 1786.

HAY in reply. The caſe of *Craig* vs *Craig* is expreſsly in point; for it was decided there that the aſſignee could not maintain the action, notwithſtanding the act of 1795. It is ſaid that the Legiſlature may add a remedy, but not a right, whe-

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ther this be correct, or not, is immaterial at present; for the distinction will have no influence in this case: Because the construction contended for, upon the other side, is the creation of a right, expressly; for, without the act of Assembly, the executors would not have been bound. So that the contract would be carried further than by the existing laws, at the time of giving the bond, it would have been carried. If there be a contract which did not bind the *heir* at the time of making it, and afterwards a law is made binding *heirs* in contracts of that kind, the heir who was not bound by the contract made prior to the law will not be affected by it.

Cur. adv. vult.

At another day in this term, the cause was reargued by Randolph and Hay.

RANDOLPH. The act clearly meant to include all cases of joint obligations, where the obligors were living, at the time the act took effect. The word *Bound* includes bonds made before, as well as those made after, the passage of the law; it is the same as if it had been *bound*, or to be bound; like the words *procreatis* and *procreandis*. It is admitted that vested rights cannot be taken away by the Legislature: but here Elliott was himself the principal in the bond, and bound, both at law and in equity, to pay it. His executors cannot, therefore, be received to say, that he had a right, at his death, to transfer the debt from his executors to the securities, and that the Legislature could not take it from him: What we contend for is no more a destruction of right, than the law endures in various other instances; as in the case of *Carter* vs. *Tyler*, 1. *Call*, 165, where the rights of the issue in tail, and of the remainderman were adjudged to be barred by the act, and yet it was as perfect, and more conscientious, than the right of Elliott could be in this case. In short it was a mere contingency, whether he would survive the others, or not,

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and could no more be called a vested right, than the expectations of the heir, before the laws altering the course of descents, and converting slaves into personal estate. At any rate as the executors were clearly liable in equity, according to the case of *Harrison* vs. *Field*, 2. *Wash.* 136, the Legislature may be strictly said, to have only created a remedy, and not a right. In other words, they have only given redress against the executors in a Court of Law, as well as in a Court of Equity.

HAY *contra.* That Elliott was the principal in the bond does not appear; but, if it did, that circumstance would not make any difference, because, whatever a court of equity might do, it is clear that at law, the executors were exonerated; and a court of law will not take notice of what a course of equity would do. The word *bound* has not the retrospective effect ascribed to it, and is not to be assimilated to the construction of *procreatis* by Lord Coke. For that is done for the express purpose of supporting the will of the donor; but it certainly never could be the intention of the legislature to bind a man further than he was bound by the original terms of the contract.

RANDOLPH. Elliotts being first named in the bond is conclusive to shew that he was the principal.

HAY. That is not a necessary inference.

Cur. adv. vult.

October 1802.

HAY for the appellant. The only question is, whether the act of 1786 operates on bonds then in being, as well as upon bonds thereafter to be executed?

I contend for the latter:

The act, in speaking of jointenants §. 1, uses words of the present time, only; for the expres-

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ſion is, jointenants *who now are*: When therefore theſe words are dropt, in the 3. *Sect.*: it is concluſive, that the legiſlature did not intend, to affect exiſting bonds. Otherwiſe, it is impoſſible to account for the difference of the language in the two ſections: And a good mode of aſcertaining the meaning of a ſtatute is, by comparing the different parts together, to diſcover what was the probable intent from a connected view of the whole text. *Co. Litt.* 381.

It is a general rule, that ſtatutes operate *proſpectively* only, 19 *Vin. abr.* 524. Rule 121. 122. 4 *Bac. abr.* 637. The court, therefore ought never to allow a ſtatute to have a retroſpective effect, unleſs compelled by plain words: And there are none ſuch, in the preſent caſe.

It is alſo a rule, that ſuch conſtruction ought to be made, as to leave no clauſe, or word, ſuperfluous. 19. *Vin. abr.* 528. Rule 160. 4 *Bac. abr.* 645. But if the word *bound* means thoſe already bound, as well as thoſe thereafter to be bound, the word jointenants means thoſe, who now hold jointly, as well as thoſe, who ſhall hereafter hold jointly. If ſo, the words *who now are*, become altogether ſuperfluous.

It is a univerſal rule, that contracts ſhall be governed by the laws of the country, where made. 2 *Wash.* 282. 1 *Black. rep.* 258. Therefore an uſurious contract made in France, may be enforced in England; although the act of Parliament is poſitive, that all contracts, for more than the legal intereſt, ſhall be void: But an exception is allowed in the very teeth of the act, upon the ſelf evident principle, that contracts ought to be governed by the laws of the country where made: It is equally obvious, that contracts ought to be governed by the laws of the country, *when made*: And, if one exception is allowed, ſo ought the other.

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Two objections, not perfectly consistent, are made:

1. That the Legislature may change the remedy, but not the right; and that here the right is not affected.

But the right is affected. For if the law had not been passed, the executors of Richard Elliott, in the event which has happened, would have been exonerated; and so would his heirs also: Whereas, according to the construction contended for on the other side, both are bound now; both the real and personal estate are liable for payment of a demand, from which, but for this law, they would have been exempted.

The Legislature ought not to do this; and therefore it ought not to be presumed.

Perhaps the Legislature cannot do it. The constitution *Sect.* 3. declares that the Legislative and and Judiciary branches shall be kept seperate and distinct. It is therefore the province of the Legislature to declare what the law shall be in future: And of the Judiciary to expound what the law *was*, and *is*. But, if the Legislature make a law operating on existing contracts, they declare what the law is concerning those contract, and depart from their duty, as much as the judges would do, who should pronounce what the law shall be.

This doctrine was maintained by this court in the case of *Turner* vs *Turner's ex'rs.* 1 *Wash.* 139.

The propriety of what I contend for is evinced, by adverting to the consequence of establishing a different principle.

Suppose, in 1785, a suit had been brought against the executors of one of Elliott's co-obligors,

Elliott himself and the other being alive, the decision, in that case, would have been in favour of the executors. But afterwards Elliott dies, his executors are sued on the bond, and the same court renders a different judgment. Elliott, *vs* Lyell.

It is said that the word *bound* means now bound, because in gifts in tail, *procreatis* means already begotten, as well as to be begotten.

This argument proves too much. For, according to *Co. Litt.* 20 (*b*) *procreandis* means the same, and extends to those already begotten also. Put the case then, that the word *ligandi* had been used, would the other side have contended in that case that this expression included those already bound, because *procreandis* included those already begotten? Surely not; for it would have been absurd.

RANDOLPH *contra*. This case differs from that of *Harrisson* vs *Field*, 2 *Wash.* 136, in this, that here the obligor survived the act, but there he was dead, before it was made. The Legislature, clearly, intended to include cases of prior bonds; for the word *bound* is the same as *to be bound:* In common parlance they import the same thing; and so they do in law, for it is the same participle with *procreatis* which Lord *Coke*, 1 *Inst.* 20 says is the same thing with *procreandis*. This kind of phrase is very frequent in our statute book; and it is a good rule, in construing a statute, to compare the language with that of the Ligislature in other places. Thus the act, concerning bills of exchange, uses the word *given*, although it imposes damages, and those damages would attach upon anterior bills. So infants at fourteen years of age might formerly have disposed of chattles, which they have been since preveuted from doing, until they are eighteen years old, by an express act of Assembly.

Again, there is an act of Assembly which directs that items beyond the period of limatation,

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ſhall be expunged, from open accounts; and it applies to prior, as well as to ſubſequent, accounts. So the action of waſte is given againſt perſons, than thoſe formerly liable. Once more, the act of 1793, *Rev. Cod.* 326, gives further remedy to ſheriffs againſt their deputies than they originally had. So, in 1792, the regulations made concerning coin, extend to antecedent tranſactions. In ſhort the language is familiar with the Legiſlature, and conſequently there is every reaſon to conclude that the extenſive terms, uſed in this law, were intended to have a general operation, and to comprehend all perſons *then* bound, or to be *thereafter* bound. This is evinced by the caſe of the jointenants, who are univerſally affected; as well thoſe created before, as thoſe created after the making of the act. Then, as to the power of the Legiſlature; they had a moral power of doing it; and no injuſtice is done, as the obligors, at moſt, had only a chance of ſurviving each other. Beſides Elliott appears to have been the principal in the bond, and therefore his executors were clearly liable in equity. *Biſhop* vs *Church*, 2 *Vez.* So that the act does not create a new right, but merely gives an additional remedy for the old one. The principle which we aſſert does not go further, than the court went in the caſe of *Gaſkins* vs *Commonwealth*, 1 *Call* 194; in which it was decided, that an act of limitations applied to prior judgments. The argument found on the doctrine in *Robinſon* vs *Bland*, 1 *Black. rep.* 258, has no weight; becauſe the univerſal principle is, that the *lex loci*, where the contract is made, ſhall govern, independant of the laws of the country, where the ſuit is brought. The ſeparate powers of the Legiſlature and judiciary, under the conſtitution, has no influence; ſince the Aſſembly had a clear right to Legiſlate upon the ſubject, and made no alteration in rights, but merely gave additional remedies.

Cur. adv. vult.

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ROANE Judge. This is an action of debt, against the executors of Richard Elliott, on a joint bond entered into, by the said Richard Elliott with T. Butler and W. Walker, on the 17th of October, 1782. At the trial, the plaintiff having offered the bond in evidence to support his action, the defendant objected thereto, and applied to the court to instruct the jury, "Whether the action against the defendant, as executor of Richard Elliott, is maintainable, or not?" But the court being of opinion, that, as the obligor Richard Elliott, died since the commencement of the act *concerning joint rights & obligations*, his representatives are made chargeable by that act, upon the said obligation, in the same manner as if it had been several as well as joint, refused to instruct the jury, to the effect desired by the defendant.

The rectitude of this opinion is now to be considered:

The question here is not, whether the Legislature have power to pass a retrospective law, if it thinks proper? but, whether the general words, of the act in question, shall be construed to have a retrospective operation?

Nor is the question here, whether the Legislature has power to transfer, to a court of common law, cognizance of a claim, which would, evidently, be established in a court of equity? There is nothing in this record, as it now stands, which would justify a court of equity in decreeing the money against the representatives of Richard Elliott, on the ground of a moral obligation in him paramount to the bound; there is nothing which evidently shews, that he was the real principal, or received the benefit for which the bond was given: Whatever our conjectures may be on this point, the record does not bear us out on this occasion: And it was well observed by Mr. Hay, on the former argument, that for any thing known to us,

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it might have been a joint debt, due for a joint benefit, received by all the obligors. This idea is rather ſtrengthened by the circumſtance of the condition of the bond extending to all the obligors, and not to Richard Elliott ſingly, and is perfectly conſiſtent with the payments made by the obligor Richard Elliott.

The true queſtion, then, to be decided, is that which was decided by the Diſtrict Court: This record does not authoriſe us to diſtinguiſh between the cauſe of the principal and ſurety: And no other deciſion ought now to be given, than would be proper, if the repreſentaves of the other obligors, inſtead of Elliott, were now before the court.

At the time of entering into the bond in queſtion, a right exiſted in each obligor, that his eſtate ſhould be exonerated from the payment of the debt by his death, living his co-obligors. Mr. Randolph's argument, that this is not a right, but a moral wrong, depends upon the aſſumption that Richard Elliott was the real debtor; It is an argument which could not be uſed, if the other obligors were before the court, and his aſſumption were well founded. The force of the argument depends therefore upon the aſſumption of a fact, which is not ſupported by the record; And this right inſeperable from the contract, by the laws then in force, ſtill exiſted, unleſs the words of the act of 1786 ſhall affect prior as well as ſubſequent contracts.

Theſe words are, "The repreſentatives of one "jointly bound with another for the payment of a "debt, and dying in the lifetime of the latter may "be charged, as if the obligors had been bound "ſeverally as well as jointly"

Under the critical and grammatical meaning of this word "*bound*" as is contended, we are called on to give a conſtruction to the act, which is con-

trary to the general nature, and operation of a ſtatute: Which will ſubject contracts to be decided upon by different laws, from thoſe under which they were made; and which will produce a diverſity of deciſion upon ſimilar contracts, made at the ſame time, in conſequence of the different periods at which the reſpective deciſions may take place. When ſuch conſequences as theſe are to follow, I ſhall certainly diſregard any conſtruction founded merely upon the grammatical extent of the meaning of a word.

Every argument in favour of the *lex loci*, as was well argued by the appellants counſel, holds with equal ſtrength in favour of the *lex temporis*: And I ſtand upon this broad principle, that men, in regulating their contracts, ſhall have the benefit of exiſting laws, and not have them overturned or affected by future laws, which they certainly could not foreſee, or provide againſt.

Theſe ideas are not new, they have had the ſanction of ſolemn deciſions both in this country, and in England.

In the caſe of *Gilmore* vs *Shuter*, *T. Jones's rep*, 108, there was a parol promiſe, in conſideration of marriage, made prior to the ſtat. 29. *Car.* 2, but to be performed after. That ſtatute enacts that, from and after 24 June, 29 *Car.* 2, no action ſhall be brought &c. without a note in writing. It was determined, notwithſtanding theſe imperative words, that, after that day, an action would lie in the caſe in queſtion; for that a conſtruction ought not to take effect deſtroying exiſting rights, prior to the paſſage of the law; and that the ſtatute only extended to promiſes made after that day.

In the caſe of *Couch qui tam* vs *Jefferies* 4 *Burr.* 2460, which was an action by an informer for a penalty, and a verdict obtained by the plaintiff, a

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ſent tenſe is entirely dropt; for there the words are, that the repreſentatives of one jointly bound with another, may be charged in the ſame manner as if the obligors had been bound ſeverally, as well as jointly. Now how are we to account for this difference in the language, except by a difference in the legiſlative will, with regard to the two caſes? In one the word *now* is anxiouſly inſerted, becauſe it was only foreſtalling the partition which the party might have made, and modifying the ſucceſſion to the eſtate: In the other it is omitted, becauſe it would create a new obligation altogether, and render the party liable further than he had engaged; which would be to alter men's contracts long after they were entered into, and thereby aboliſh the beſt eſtabliſhed principles of juſtice. A conſequence which gives a very unfavourable complexion to the claims of the appellee. Statutes are *prima facie* proſpective in their operation; and retroſpective laws, being odious in their nature, it ought never to be preſumed that the Legiſlature intended to paſs them, where the words will admit of any other meaning. Every conſtruction, therefore, which goes to introduce a retroactive effect, and by altering the engagements of men, to defeat juſtice, is contrary to the general ſyſtem of an enlightened juriſprudence. Conſequently if the words be even doubtful, ſuch a conſtruction ought to be made as is moſt conſiſtent with reaſon, and the rights of the parties to be affected. But this will not be attended to, according to the interpretation which is contended for by the appellees counſel; for there being no expreſs declaration that exiſting bonds ſhall be included, and the words uſed being, not only, ſuſceptible of a future ſenſe, but the whole context of the ſtatute, manifeſtly pointing at a proſpective operation, any conſtruction which will produce an *ex post facto* effect, would abſolutely be to ſtrain the words, in order to change the contract, and vary the rights of the parties. But as I cannot ſubſcribe to an expoſition productive of ſuch conſequences, my opinion is

that the judgment ſhould be reverſed, and anew trial awarded, with an inſtruction to the effect which has been propoſed by the Judge, who preceded me. Elliott, *vs* Lyell.

LYONS Judge. I have always conſidered *ex-poſt facto* laws as unjuſt and improper; but in 10 *Co.* 55, it is ſaid that acts of Parliament may have retroſpect, if ſo intended: and Lord Hardwicke, in *Lees cases* 7, lays it down that a Parlimentary conſtruction a former ſtatute ought to be regarded. However, as ſuch laws are, neceſſarily, oppreſſive, courts have never been fond of giving a retroſpective effect to a ſtatute, if the words would admit of a conſtruction more conſiſtent with reaſon; for, in caſes of that kind, the rule is to follow the meaning, and not the words; eſpecially if theſe tend to alter the terms of exiſting contracts, or to take away the rights, or property, of the citizen. 12 *mod.* 687, 10 *mod.* 513, *Cowp.* 29. Whenever, then, the words are doubtful, the courſe is to enquire for the intention, and, if poſſible, to avoid a conſtruction which would deſtroy the principles of natural juſtice, and overthrow rights already acquired: Hence, in the conſtruction of the ſtatute of frauds, actions previouſly accrued were held not to be barred. 1 *Ventr.* 230, 2 *mod.* 310; and that for regiſtering contracts of ſouth ſea ſtock was decided not to extend to prior contracts, 2 *Lord Raym.* 1350. It was upon theſe grounds that I founded my opinion in *Turner* vs *Turner's ex'rs*; and not upon the aſſumption of a power to controul the acts of the Legiſlature, and declare them void, becauſe not approved of by me. To apply theſe principles to the caſe now before the court: The queſtion, here, depends upon the true conſtruction of the act of 1786, concerning joint rights and obligations. For the appellee, it is contended that the word *Bound* has a retroſpective operation; becauſe, being the perfect participle paſſive, it may comprehend time paſt as well as future. But there is no neceſſity for impoſing this twofold ſenſe upon

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the word, when it is plain that the meaning of the Legiſlature, can be better attained without it. Why extend the act to paſt contracts, when confining it to thoſe which ſhould be afterwards entered into, will ſatisfy the words, and produce a conſtruction more conſiſtent with reaſon and the rights of the citizen? The object of the law was to correct a ſubſiſting inconvenience, and not to create one, by ſubverting principles. But how was this to be effected? Not by altering old contracts ſurely, but by regulating new ones. Not by adding further obligations to anterior engagements, but by attaching new qualities to future ones. Finally, not, by giving preſent creditors a ſurther ſecurity, but by inveſting future obligors with additional rights. All this was conſiſtent with the true principles of Legiſlation, but the other would have been repugnant to them. Of courſe, if the text be doubtful, the fair inference is that the Legiſlature, who, without expreſs words, ought not to be preſumed to have willed injuſtice, intended to provide for future contracts, only: And if ſo, the grammatical conſtruction is not to be regarded, but ſuch an expoſition is to be made, as will beſt comport with the views of the Legiſlature, and the rights of the parties. This will be completely attained, by leaving anterior bonds as they were, and by rendering the eſtate of the decedent liable upon thoſe to be made in future. I am therefore of opinion that the judgment is erroneous, and ought to be reverſed.

PENDLETON Preſident. The bond on which the preſent ſuit is brought, is dated October 7th 1782, by which three perſons are jointly bound in the penalty of £600, with condition to be void on payment of £300, by either, in December 1783. In 1786, an act paſſed "that the repreſentatives of one jointly bound with another, for the payment of a debt &c. and dying in the lifetime of the latter, may be charged by virtue of ſuch obligation, in the ſame manner as ſuch repreſentatives might

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have been charged if the obligors had been bound ſeverally as well as jointly. At the time of paſſing this act all the obligors were living, but before any ſuit, Elliot, one of them died, by which, as the law ſtood when the bond was entered into, he was diſcharged at law, and the remedy was againſt the ſurviving obligors; but this ſuit is brought againſt his executors upon a ſuppoſition that this act gives to prior joint bonds then exiſting, the effect of ſuch as were joint and ſeveral, which is the opinion of the Diſtrict Court, and whether it be ſo, or that the act is to operate only on bonds entered into ſubſequent to its commencement, is the preſent queſtion. It was well obſerved by Mr. Hay that the Legiſlative proviſions are to operate proſpectively, declaring what the law ſhall be, not what it is; And it muſt, be acknowledged that retroſpective laws, uſually termed *ex post facto*, that is, ſuch as declare prior acts criminal, which were not ſo at the time they were done, or which either impair or give a new and important force to exiſting obobligations or contracts, contrary to their ſituation at the time they were entered into, are againſt the principles of natural juſtice. Citizens contract on a view of exiſting laws, without anticipating future regulations. The Federal conſtitution has prohibited the State Legiſlatures from paſſing any ſuch laws, and altho that is ſubſequent to the preſent act, I conſider it as declaring a principle which always exiſted, a principle adhered to by our Legiſlature in general, ſince in all their repealing clauſes, there is a ſaving of all rights veſted under the former laws; but more particularly in an act paſſed in January one thouſand ſeven hundred and eighty eight, which will be noticed hereafter.

The power of the Judiciary to declare a legiſlative act void as unconſtitutional, has been lately

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much agitated. On this occaſion we are not obliged to give an opinion on that general queſtion, ſince in my judgment, the Legiſlature did not intend that this clauſe in the act of 1786 ſhould operate upon prior joint bonds. The word *bound* may in a grammatical ſenſe mean paſt bonds, or future, or comprehend both; and we are to inquire in which ſenſe it was here uſed. The firſt evidence of intention, that it ſhould operate futurely only, was properly drawn from the expreſſion varying from that in the firſt clauſe reſpecting joint rights, ſpeaking of joint tenants *who now are*, or who hereafter *ſhall be*; and conſidering that under former laws a joint tenant might at any time ſever the jointure by his own act, the law ſeems only to have varied the remedy, and not to have affected the right. But how did the law ſtand reſpecting joint obligations before this act? The death of one of the obligors wholly diſcharged him at law, and threw the obligation on the ſurvivors. If the dying obligor was the principal, altho diſcharged at law, his repreſentatives were liable to the creditor in equity, becauſe he was under a moral obligation to pay the money, independant of the bond, or if his ſureties paid the money, his executors are anſwerable to them, even at law, for their reimburſement. But if the perſon firſt dying was a ſurety his eſtate was totally diſcharged from the claim of the creditor, with whom he had equal equity: perhaps he might be liable to contribution at the ſuit of the other ſecurities in chancery; but on that I give no opinion. On a joint and ſeveral bond, each and their eſtates were bound for the whole at law. Very properly, then, did they drop the expreſſion, *who now are* bound, uſed in the former clauſe: And when we are on conſtruction what the Legiſlature meant by this general term *bound*, ſince giving it an operation on future bonds only will give the word a meaning, ſhall we extend it to former bonds, and make them violate the great principles before ſtated? I think not. Arguments of publick inconvenience have juſt weight in conſtruc-

tion of ſtatutes; and we were alarmed by the counſel, with a long liſt of our acts of Aſſembly retroſpective in their operation which will be affected by the preſent deciſion.

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I have looked over the laws refered to, and without giving an opinion upon them reſpectively, I can only obſerve that in general they merely vary the remedies on exiſting obligations, without adding to or diminiſhing their original force. Which is the caſe of motions againſt ſheriffs and their ſecurities and the repreſentatives of both, and for ſheriffs againſt deputies and *theirs*. When the remedy was given by motion againſt the ſecurities and their repreſentatives, both were conſidered as bound by exiſting obligations; all thoſe bonds being joint and ſeveral, unleſs made joint thro' miſtake. But ſuppoſe a ſurety bound by a joint bond at the time that law paſſed, and after his death, which diſcharged him altogether, as the law was when he gave his bond, a motion is made, againſt his executors for judgment under the new law; it would come to the preſent queſtion, and would receive a like deciſion. The great caſe if docking eſtates tail, was partly mentioned by Mr. Randolph, and as I have often heard it complained of, it may deſerve particular notice. That act did not take from any perſon, a right *vested*, either in poſſeſſion, reverſion, or remainder, but unfettered them of limitations, which reſtrained their power of diſpoſition of which they could not complain, ſince if they choſe, that the land ſhould go to the next heir in tail, they might ſtill ſo diſpoſe of it by deed or will. But it diſappointed the expectation of heirs, apparent: It would be ſtrange indeed, if the Legiſlature was reſtrained from paſſing laws which might diſappoint the hopes of men. But what was the exiſting ſtate of theſe expectations? In England they might at any time be defeated by fine and recovery. Our Legiſlature in 1710, prohibited that mode, and reſerved to themſelves the ſole power of docking intails which they exer-

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ciſed by laws, paſſed in each particular caſe, till 1776, and then paſſed the general law, upon principles of public utility, preſerving as I ſaid, all veſted rights. Children of wealthy parents, hope to ſucceed to a comfortable proviſion; but ſhall that hope reſtrain the Legiſlature from paſſing laws, ſubjecting the whole property of the parent, if neceſſary, to the payment of his debts? The caſes appear to me to aſſimilate. But further to ſhew the intention of the Legiſlature to avoid the changing exiſting obligations I would refer to the act paſſed in January 1788, which I before mentioned, and was one of thoſe in the counſels liſt; that act declared that the lands of the ſheriff, coroner, or other public collector and their ſecurities, may be taken, on a *fieri facias*, on judgments to be obtained againſt them, with a proviſo, that it ſhould not extend to any ſecurities who ſhould have become ſo before the paſſing of that act, plainly diſtinguiſhing between the principal (as to whom the remedy was only varied) and the ſecurities, whoſe obligation was not to be changed. From whence, I preſume that if the Legiſlature had intended the clauſe now under conſideration ſhould comprehend prior obligations, they would have obſerved the ſame diſtinction between the principal and ſecurities, and there would have been no objection to the law. But they have not made the diſtinction; and ſince the court cannot make it, but the latter as well as the former muſt be involved in the ſame deciſion, we muſt decide it as a general queſtion reſpecting all the obligors; altho it is probable, that Elliott was the principal in this caſe, from his being firſt named, and having paid part of the money. And I am of opinion, that the law does not reſpect this bond at all, but the creditor is left to his former remedy againſt the appellant in equity, or againſt the ſurviving obligor, who in the event of their paying, may reſort to the appellant for reimburſement. Upon the whole there is error in the judgment, which is to be reverſed by the unanimous opinion of the court

HARRISON & Others, *againſt* ALLEN.

THIS was an appeal from the High Court of Chancery, brought by Carter Harriſon and Mary his wife, and by Anne and Martha Allen againſt William Allen. The appeal is grounded on the following caſe.

The act of 1785, concerning deſcents, was reſtored by the ſuſpending act of 1792.

John Allen by his will dated in May 1783 deviſed all his eſtate to his father William Allen the elder, and afterwards purchaſed a tract of land called *neck of land and Robinsons quarter* in James city county. In September 1789 the ſaid William Allen, the elder by his laſt will, after certain ſpecific bequeſts, deviſes as follows, "Item, I "give and deviſe, to my ſon John and his heirs "forever, all my lands in the county of Surry and "in the county of Suſſex. Item, I give and de-"viſe, unto my ſon William all my lands *in the* "*county of New Kent and James city*, to him and "his heirs forever, alſo all my lands in the coun-"ties of Southampton and Nanſemond, to him "and his heirs forever. Item, I give my planta-"tion on the three creeks to my ſon John, to him "and his heirs forever, I alſo give him my new "Charlot. Item, I give my plantation called the "Fort quarter to my ſon William and his heirs "forever. Item, all the reſt and reſidue of my eſ-"tate, of what nature or kind ſoever, I give to "my ſaid two ſons to be equally divided between "them." The ſaid John Allen died in May 1793; and the ſaid Wm Allen the elder in July 1793, leaving then alive one ſon, to wit, the ſaid Wm. Allen the defendant, and three daughters, to wit, Mary (married to Harriſon,) Anne and Martha the plaintiffs. The defendant contends,

1. That the deviſe of the lands to John having lapſed by his death in the lifetime of his father, the lands ſo deviſed deſcended to the defendant as

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heir at law to his father, inaſmuch as the act of the 8th of December 1792, had repealed the act regulating the courſe of deſcents paſſed in the year 1785, and as the operation of the act of December 8th 1792, was ſuſpended by the ſuſpending act of December 28th 1792, until the 1ſt of October 1793, the common law was reſtored, there being no act of aſſembly in exiſtence to regulate the deſcent; becauſe the ſuſpending act did not revive the act of 1785, as that would be repugnant to the act of 1789, which declares that, if a ſtatute be repealed and the repealing ſtatute be afterwards itſelf repealed, the firſt ſtatute ſhall not be revived.

2. That the *neck of land* tract purchaſed by John did not paſs by his will to his father, becauſe John did not own it at the time of making his will, which was before the act of 1785.

3. That the *neck of land* tract did not deſcend to William the father, becauſe, the act of 1785 being repealed, and that of the 8th December 1792 ſuſpended, the common law gave the rule.

4, That, if the *neck of land* tract did paſs, by John's will, or deſcended on his father, then it paſſed, by the will of Wm. the father, to the defendant: If not the whole, at leaſt a moiety under the deviſe; and a fourth of the other moiety, would deſcend on the defendant.

The plaintiffs inſiſt,

That the act of 1785 was reſtored by the ſuſpending act of the 28th of December 1792; and therefore that the lapſed lands deſcended to them and the defendants in coparcenary. That the neck of land tract either paſſed by the will of John, or deſcended to his father; and, from him, it deſcended to the plaintiffs and the defendant in coparcenary, and did not paſs by the will of the father.

The Court of Chancery decreed in favour of the plaintiffs, and the defendant, William Allen appealed to this court.

WICKHAM for the appellant. Two important questions arise in this cause. 1. Whether the suspending acts restore those of 1785, relative to wills and descents? 2. If so, whether the neck of land tract, inherited from the testator's son John, passed by the will of William Allen the father?

As to the first: It is submitted whether *Proudfit* vs *Murray*, 1 *Call.* 394, gives the rule with regard to the suspending laws in general, and particularly with regard to this case?

As to the second: According to the decree, the appellant gets a larger proportion of the personal, than he does of the real estate; when, if the just construction had prevailed, he ought to have had five eighths of each. The Chancellor has laboured to prove, that the devise of the lands in Ja's city does not comprehend this tract; but without taking up time to investigate that position thoroughly, I shall merely observe, that this part of the will strengthens our construction of the residuary clause, which we contend carries these lands. With respect to personal estate, the law always has been that a devise of personal property relates to the death of the testator, and not to the time of making the will: And yet the testator can no more foresee, when he is making his will, that he will be possessed of a lease of land, or of a slave, at some future day, than he can that he will be owner of other lands, after the will is made. Consequently, if a residuary clause will carry the first, it ought to carry the second also. The reason given by the Caancellor, why the residuary clause carries the personal estate acquired after making the will, is incorrect, and is supported by no authority; for it is not, because the property is fluctuating, but because it was a rule of the civil law,

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from whence it was borrowed by the Eccleſiaſtical Courts: Which did not apply to real eſtates, becauſe, they could not be deviſed, unleſs the teſtator had them, at the time of making the will. At common law lands could only be deviſed by cuſtom *Litt. Sect.* 167, and the ſtatute of *Hen.* 8, merely gave power to deviſe thoſe, which the teſtator had, at the time of making the will; for the words are, that a perſon *having* lands may deviſe them; and the early conſtruction on it, conſidered the word *having* as requiring a title at the time of making the will, *Butler* vs *Baker*, 3 *Co.* 30. Which ſhews that a will in England operates like other conveyances by deed, and not as the inſtitution of an heir by the Roman law. *Cowp.* 305. Therefore when our act of Aſſembly removed the impediment to deviſing lands, it neceſſarily ſubjected them to the ſame ſituation, under reſiduary clauſes, as perſonal eſtate is ſubject to. For as feudal reaſons prevented it, at firſt, when they were removed, the reſiduary clauſe ought to have the ſame operation, as to both. That John is joined with William in the reſiduary deviſe makes no difference; for the teſtator, who is to be conſidered as *inops conſilii*, will ſtill have intended to paſs all the reſiduary eſtate; which he might have at the time of his death; and conſequently lands however derived, for that is the idea of men, in general, when they inſert ſweeping clauſes in their wills. This conſtruction is conſiſtent with the policy of the Legiſlature, who evidently intended to put both kinds of property on the ſame footing.

CALL *contra.* 1. The lands deviſed to John by the will of his father, deſcend to the plaintiffs and defendant, who are the children of the father,

For the act of 1785 as reſtored by that of December 28th 1792. *Proudfit* vs *Murray*, 1 *Call* 394. *Brown* vs *Barry*, 3 *Dall.* 367. Therefore, as the deviſee died in the lifetime of the teſtator,

the deviſe became void: Of courſe, the lands were undiſpoſed of by the will; and deſcended on the teſtators heirs, the preſent plaintiffs, and the defendant. Harriſon, &c. Allen.

2. The conſequence of this is, that the *neck of land* tract, upon the death of John, under the act of 1785, which was revived by the ſuſpending act, became the property of William the father: On whoſe death it deſcended on his children; and did not paſs by his will. For the act of 1785, does not create a rule of conſtruction: It merely gives the teſtator a *power* of deviſing *after acquired* lands. But this power he may exerciſe or not, as he pleaſes; and therefore he muſt manifeſt an intention of doing ſo, or the old rule will prevail.

In the preſent caſe, however, the teſtator has not manifeſted any intention of paſſing this tract of land; ſince he uſes no future words, or any expreſſion equivalent thereto.

For the deviſe of the James city lands did not paſs them; becauſe the teſtator, meant to ſpeak of the lands he then had in that county. For it is improbable, that he calculated not only that he ſhould own other lands at a future day, but that he ſhould own them in a particular county. This is too remote a poſſibility; and therefore the court will not infer it, but confine the deviſe to the lands which the teſtator had in that county, at the time of making the will.

The reſiduary clauſe does not paſs them. Becauſe the teſtator poſſeſſed a large reſiduary eſtate, which was ſufficient to ſatisfy it; and therefore if any inconvenience or abſurdity will follow, from including the *neck of land* tract under the reſiduary clauſe, the court will confine it to the other eſtate. *Kennon* vs *M'Roberts*, 1 *Wash.* 113.

A groſs abſurdity would follow from the other

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constructions, for the devise is to John and William: So that, according to that interpretation, the testator will be made to devise to his son John the very lands which he was to inherit from that John himself. Which would be preposterous; and therefore, upon the rule in *Kennon* vs *M'Roberts*, the devise is to be confined to the other estate.

That the personal estate is subject to a different rule, and that the devise, as to that, takes effect from the death of the testator, makes no difference. For that does not depend upon the rule of the Roman law as is supposed, but is founded upon the reason stated by the Chancellor; namely, the mutability and fluctuation of that kind of property, which is so subject to change, that the testator, on any other construction, must make a new will every day. 4 *Bac. ab.* 350 *(new edit.)* Whereas lands, are not subject to such changes, as a man seldom owns more than one, or two, tracts in the course of his life. And therefore there is no necessity for extending the expression, so as to include objects not contemplated by the testator, when he made his will.

RANDOLPH on the same side. The case of *Kennon* vs *M'Roberts* expressly applies; and shews that, as there was other estate for the residuary clause to operate on, it ought to be confined to that, and not extended to this, tract of of land; because the absurdity of the testators devising lands, inherited from the son, to the son himself, must otherwise follow. The testator, although he had the power, was not bound to exercise it; and it appears, in this case, that he did not intend to exercise it. For, independant of the absurdity just mentioned, the preamble shews he only meant to devise the property which he then had; because he there, only professes to dispose of the *estate, which it has pleased God to bestow upon him:* Thereby, plainly meaning the property which he then had. Upon this idea, I contend

that even the after acquired perſonal eſtate did not paſs. The general reaſoning, in *Davers* vs *Dewes*, 3 *Wms.* is in favour of this opinion; and ſhews that, under circumſtances like the preſent, perſonal property, acquired after making the will, does not paſs, by a general reſiduary clauſe. The act, only, intended to give the teſtator power to deviſe after acquired lands; which he had not the means of doing before, *Pow. Dev.* 196. But this was a right which he might exerciſe, or not, as he pleaſed; and therefore the ſimple queſtion is, whether the teſtator intended to deviſe this tract? which nobody, under the circumſtances of the caſe, will anſwer in the affirmative. It is impoſſible he could have meant to deviſe, to John, the lands he was to inherit from him.

WICKHAM in reply. The laws upon this ſubject ought to be conſidered as one ſyſtem; and therefore it is proper to conſider what the law was before the ſtatute. The rule, with regard to perſonal eſtate, is predicated on the Roman law; which, on account of feudal regulations, could not apply to lands: And the act of *Hen.* 8, only gave power to deviſe the lands which the teſtator had at the time of making the will: So that, notwithſtanding that ſtatute, the rule could not take place, becauſe the impediment was only removed in part. But, when the act of Aſſembly deſtroyed the obſtruction altogether, there was nothing to prevent the operation of the rule; and, therefore, ſince that time, the rule fully applies. As to the want of words of *future* ſignification, that objection equally applies to the perſonal eſtate, and yet the law is clear, that, as to that, the will operates from the death of the teſtator. The caſe of *Kennon*, vs *M'Roberts* cannot have decided ſo much the other ſide contends for. It is not material that John was one of the deviſees; for the teſtator did not foreſee what lands he ſhould own in particular, at his death; and therefore he meant that the whole reſidue of his eſtate, real and perſonal,

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should pass under the residuary clause. For he did not mean to distinguish between them. The reason given for the rule as to personal estate, in 4 *Bac.* 350, is not correct; and the author is not supported by other authorities.

CALL. In *Swinburne* 418, it seems as if the rule formerly was, that the will operated, from the time of making it, as to personal estate; and he appears, by the books cited in the margin, to have extracted it from authors upon the civil law: Which proves that the present rule is the work of the English courts, founded upon the inconveniences arising from the mutable nature of personal property. But there is another reason given for it, by Lord Parker in 1 *P. Wms.* 575, which defeats Mr. Wickham's argument bottomed on the Roman law; namely, that the rule was adopted, because unless the estate went to the executor, there was no person before the statute of distributions to whom it could have gone, but it must have escheated; and therefore, from necessity, it was decided that all belonged to the executor.

WICKHAM. Lord Mansfield, who is admitted to have been a great civilian, states the rule to have been founded on the civil law.

ROANE Judge. In this cause two questions occur.

1. Whether the descent law of 1785, was in force, or not, at the time of Wm. Allen's death, which happened in 1783?

2. Whether the statute, respecting wills, of 1785, operating upon the will of the said Wm. Allen, will pass his lands acquired after the date thereof?

As to the first question; it was rightly conced-

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ed, by the appellants counsel, that it was concluded by the decision of this court in the case of *Proudfit* vs *Murray* 1 *Call* 394. That decision revokes the effect of the repealing act of '92, until October '93, by construing both the repealing and suspending acts to relate to the first day of the session, and thus to commence their operation together. This construction was made under the common law doctrines upon this subject; and the rule governing in that case was resorted to, in consequence of another act having rejected the rule laid down in the act concerning elections in relation to two acts passed during the same session.

This rule, of construing a statute to operate by relation, taken in its full extent is certainly often retrospective, and productive of the highest injustice. It has accordingly been changed in England (as well as here,) by stat. 33 *Geo.* 3, *ch.* 13. In the case of *Proudfit* vs *Murray*, however, as well as in this case, it had no retrospective operation; for the contract in that case, as well as in this, arising posterior to the passage of the relating acts and probably posterior to the rising of the Assembly, I believe I shall be warranted by my colleagues in saying (for I did not sit in the cause) that the decision in that case was not meant to extend to a *mesne* act happening between the first day of the session, and the times of passing the act so relating. This would be to render a contract lawful at the time, or an act then innocent, the one unlawful, and the other criminal, by relation! Such a doctrine is contrary to the general nature of a statute, which is prospective in its operation: And it may well be questioned, whether a doctrine of the common law, so replete with injustice, and so inapplicable to the circumstances of any people professing to be governed by *existing* laws, can be adjudged to have been adopted by the ordinance of 1776? It is true this evil will the seldomer occur, as that rule of the common law is now confined to the case of two statutes passed during the

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ſame ſeſſion: But it may yet ſometimes occur, as is ſuppoſed; and whenſoever it does, it will deſerve great conſideration before the court can ſanction ſo retroſpective, and iniquitous a conſtruction.

Had this deciſion of *Proudfit* vs *Murray*, not ſettled the queſtion, I ſhould have wiſhed to have further conſidered, whether a ſtatute, not differing from a former one, but merely iterating the proviſions of it, and containing a repealing clauſe, can be ſaid to repeal the former? At preſent, I ſee conſiderable force in the Chancellors ideas on this queſtion; but I wiſh not to prejudge it.

As to the ſecond queſtion: It is admitted, that a teſtament of perſonal eſtate ſpeaks not until the death, and that after acquired chattles do paſs. Whether this doctrine was tranſplanted into England from the Roman law, or not, it is immaterial to enquire. Perhaps, however, it was; and the courts in England aſſign a cogent reaſon in ſupport of it, as applicable to chattles ariſing from the fluctuating nature of that kind of property.—1 *P. Wms.* 240. But that reaſon does not hold in relation to land, which is more permanent, and with reſpect to which the teſtator may more eaſily keep pace, by varying his deviſes. Beſides, this doctrine of the Roman law, was interrupted in England, as relative to lands, by the doctrines of the feudal law, on the ſubject of non alienation: And when teſtamentary alienations were permitted by ſtatute, they were conſidered, not as a conſtitution of a general heir, but as a limitation of the teſtators eſtate by a revocable act, 3. *Burr.* 1496.—And as an appointment of particular lands to a particular deviſee: But a man cannot appoint to another, lands which he has not. *Cowp.* 90.

The appellants counſel was miſtaken in ſuppoſing, that the deciſions, relative to land, turned upon the word *Having*, in the ſtatute of wills, as

may be ſeen in *Cowp.* 90; where it is alſo obſerved, that the ſame conſtruction had taken place upon the cuſtom, before the ſtatute.

Theſe two deciſions, therefore, conſtitute the grounds of the criterion, between the two kinds of property. As to that impediment which aroſe from the feudal ſyſtem, there could certainly be no objection, with the Legiſlature, to get over it: But the other reaſon, ariſing from the fluctuating and tranſitory nature of perſonal property, does not hold as to land; and there is ſtill the leſs neceſſity to extend the rule to that kind of property, by conſtruction, ſince the equitable laws of deſcent lately enacted. It was enough for the Legiſlature to authoriſe a diſpoſition of *after arquired* lands, by deviſes evidently contemplating ſuch property. Further they have not gone: And as the will now before us does not evidently contemplate *after acquired* lands, I am of opinion, that the decree ſhould to be affirmed.

FLEMING Judge. Three points were made by the counſel for the appellant in this cauſe.—1ſt, Whether, during the period between the 8th of December 1792, and the 1ſt of October following, the common law was reſtored, ſo that the lands deviſed by William Allen the father to his ſon John, (the deviſe having become ineffectual by the death of the ſon living the father) deſcended on the appellant as his eldeſt ſon and heir at law, in excluſion of his ſiſters?—2d. Whether the lands acquired by John Allen, after the date of his will, paſſed by the deviſe of all his eſtate to his father; and from him (whether his title were by deſcent or purchaſe) to the appellant under that clauſe of his will which gives all his lands in the counties of New Kent and James city to his ſon Wm? And if not, then, 3d, Whether the appellant is entitled to a moiety of them under the reſiduary clauſe of his father's will?

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The firſt point having been fully conſidered in *Proudfit* vs. *Murray*, 1 *Call*, 394, was but ſlightly mentioned by the appellants counſel; but it may not be amiſs to make a few obſervations on it, in order to ſhew my entire concurrence in the principle eſtabliſhed in that caſe. The poſition contended for by the appellants counſel is, that the act of 1789 having declared, that whenſoever one law, which ſhall have repealed another ſhall be itſelf repealed, the former law ſhall not be revived, without expreſs words to that effect; and, therefore, as the act of 1785 had been repealed by the act of the 8th of December 1792, it was not revived by that of the 20th of the ſame month; but, there being no ſtatute in the way, the common law rule of primogeniture was reſtored. This argument, however, involves its own deſtruction; becauſe if the act of 1785 was not reſuſcitated by that of the 20th of December 1792, no more could the rule of primogeniture for that had been as completely abrogated by the act of 1785, as the latter was by the act of the 8th of December. Beſides it may be a queſtion whether thoſe parts of the act of 1785, which were re-enacted into that of the 8th of December, were repealed by the latter, ſince the will of the Legiſlature remained the ſame. But be that as it may, ſurely that conſtruction would be a ſtrange one, which ſhould allow that the repealing clauſe of the act of 8th of December ſhould alone continue in force, whilſt the operation of every other part was ſuſpended, by that of the 20th. It would certainly be fairer to ſay that the operation of all, or none, of it was poſtponed. Again, it is a rule that all ſtatutes on the ſame ſubject, ſhould be taken as one law; and conſtruing the acts of the 8th and 20th of December, by that rule, the ſuſpending act muſt be conſidered as annexed to the other, immediately after the repealing clauſe: In which caſe, the act of the 8th of December will not operate at all, until the expiration of the ſuſpending act; and conſequently, the act of 1785 will continue in force,

until the 1st of October 1793. This construction supports the evident will of the Legislature, and puts an end to the discussion on the first head.

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With respect to the second point: The Neck of Land tract did not pass by the will of John; because it was purchased by him after the making of his will, and both the will and purchase were made prior to the passing of the act of 1785, and therefore could not be affected by the subsequent provision of that act, enabling the testator to dispose of all the lands which he has, or may have, at the time of his death. But that circumstance does not alter the case; because the rights of the parties to this suit will be the same, whether William Allen the father took them by descent, or purchase, from his son John. The question then is, whether they passed by the will of the father? The act of 1785 only gives a power to devise after acquired lands, leaving it to the discretion of the testator to dispose of them or not: Consequently, in order to produce that effect, there must be something indicating an intention to exercise the power. But, in the present case, the testator could not have intended to devise to his son John those lands, which he was to acquire from himself, by descent. Such an idea was too absurd to have entered into the head of any man in his senses. Of course the after purchased lands did not pass by the will of the father.

With respect to the third point: It is extremely clear that this moiety did not pass under the residuary clause of the father's will; because that was intended to pass only what was not given before; but this moiety was expressly given to John, and therefore could not be comprehended under the residuary clause. The consequence is, that, as the devise to John failed by his death in the lifetime of the testator, this moiety descended on the female plaintiffs and the defendant, as the heirs of the father.

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I am therefore of opinion that the decree of the Court of Chancery is right; and ought to be affirmed.

PENDLETON Preſident. We have to lament that the court is ſo thin, on the deciſion of a queſtion ſo important to the parties, and the community, as well, becauſe we are deprived of the able advice and aſſiſtance of two of our worthy brethren, as becauſe, if they had accorded with us, it would have given additional ſanction to the precedent: On which account, we ſhould certainly have forborne to hear the cauſe, if we had not been informed, that the Judge who is abſent (as well as him who is preſent) would have retired from the diſcuſſion. We have, however, this conſolation, that we all agree in opinion, and indeed have had very little doubt upon the queſtion.

The caſe is ſhortly this, William Allen by his will, dated Sept. 4th 1789, having deviſed ſundry perſonals to different legatees, and ſeveral tracts of land to his two ſons John and William Allen, deviſes "all the reſt and reſidue of his eſtate of what nature or kind ſoever, to his two ſons, to be equally divided between them," and appointed them his executors. He lived 'til July 1793: and in the mean time his ſon John died without iſſue; by which a conſiderable eſtate conſiſting of the lands, the ſubject of the preſent controverſy, (called *neck of land and Robinsons quarter*) and a number of ſlaves, came to Wm. the father, whether by his ſons will, or as heir at law, is immaterial. It is admitted that the ſlaves and perſonals were comprehended in the reſiduary clauſe in the fathers will, ſo as to give the ſon Wm. a moiety thereof; but, as to the lands, it is inſiſted, that they did not paſs by that clauſe, but deſcended to the teſtators heirs at law; and ſuch being the chancellors decree, the appeal brings that queſtion before this court. For, as to the ſeveral eſtates deviſed to John, it is agreed the bequeſts became lapſ-

ed by his death in his fathers lifetime; and the estate was distributable to the testators heirs. The rule in England is that, as to lands, a testator is supposed to speak at the date of his will, and therefore altho he shall devise all the lands which he may have at his death, any lands which he may acquire after the date of his will do not pass, but descend to his heirs; but that as to personals he is supposed to speak at the time of his death, and a general residuary devise will comprehend all his personals, without inquiry when they were acquired. There was much labour at the bar to shew from what sources this distinction was derived, which appears to me not material. If it was so, my impressions are that the distinction proceeded from the nature of the property. Lands are visible and durable, and their acquisition being by written conveyance, no difficulty occurs in ascertaining the time it takes place. Besides being valuable, they were on the English policy, considered as a natural fund for the heir; and that after purchases were not meant to be comprehended in a general devise. The rule being established, when, in *Bockenhams* case, there was a devise of all the lands he *then* had, or *should* have, at his death, there was great labour to make the rule bear upon that case, from the word *having* in the statute of wills, and other observations; but the decision applied the rule to that case.

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On the other hand personals were, when the rule was established, of inconsiderable value; in their nature perishable, and mutable; the property transfered by mere change of possession, without written conveyances, and in secret, rendering it difficult, if not impossible, to ascertain the time of its acquisition, whether prior, or subsequent, to the date of the will. It was on this transient nature of personals, that another common law rule prevailed, forbidding a division of interests in them, which was permitted in the case of real estate. A donation for an hour passed the whole property, not allowing any remainders,

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or reverſions to operate. But whatever was the ſource of its foundation, the rule as it came to us from England, was well underſtood, and eſtabliſhed the diſtinction I firſt ſtated, that, as to lands, the teſtator ſpeaks at the date of his will, and, as to perſonals, at his death.

It is certainly true that the revolution produced a great change in our ſyſtem, but not ſo broad as was contended for by Mr. Wickham, ſo as to put all transfers of property, whether real or perſonal upon the ſame ground. The change was principally confined to the caſe of deſcents and diſtributions; a difference being ſtill preſerved in the diſpoſition of property, either by deed in the perſons lifetime, or by will. *Lands* can only paſs by a particular mode of conveyance; *personals* ſtill by mere tranſmutation of poſſeſſion: *Lands* paſs only by a will in writing, ſubſcribed by two witneſſes, or written by the teſtator; *personals* may be diſpoſed of by any will, written or nuncupative: And, if the diffuſive ſpirit of the law of deſcents be recurred to, ſetting aſide the rights of primogeniture, and calling to the ſucceſſion all who are in equal degree of kindred, it will ſeem to oppoſe Mr. Wickhams doctrine, by letting in thoſe collective heirs, inſtead of giving the eſtate to a particular reſiduary legatee; a ſpirit which alſo dictated the abolition of all eſtates tail, in order to extend the power of alienation, and, in caſe of deſcents, to bring all our lands within the operation of the new ſyſtem.

Having made theſe general preliminary obſervations, I proceed to conſider what the Legiſlature have directed in the caſe under conſideration. The words of the clauſe are, "That every perſon aged "21 years or upwards, being of ſound mind, and "not a married woman ſhall have power at his "will and pleaſure, by laſt will and teſta- "ment in writing, to deviſe all the eſtate, "right, title and intereſt, in poſſeſſion, re-

"erſion, or remainder, which he *hath*, or *at the* "*time of his death ſhall have* of, in, or to lands, te- "nements or dereditaments, or annuities, or rents "charged upon, or iſſuing out of them." With reſpect to the preſent will, it was truly obſerved to be very abſurd to ſuppoſe that the teſtator meant to deviſe to John and William lands which would come to him from John by his death. A full proof that he did not mean to comprehend them in his reſiduary deviſe: And ſince the intention of the teſtator is to be the governing principle of conſtruction, it might be ſufficient upon that ground to affirm the Chancellors decree, in the preſent caſe. But to ſettle the queſtion in caſes where that objection may not occur, the court proceeded to conſider it as a general queſtion. If the Legiſlature had intended to aboliſh wholly the diſtinction in England, they would certainly have declared that every teſtator ſhould be conſidered as ſpeaking in his will at the time of his death, as well reſpecting his real, as his perſonal eſtate; and thus have put an end to all controverſy about it: Inſtead of which, they have only varied the rule as to lands, *ſub modo*, that is, by giving teſtators a *power* which they may exerciſe or not, at their will and pleaſure, to diſpoſe of their after purchaſed lands; meaning, as it appears to me, to meet the deſire in *Brockenham's* caſe, where a man ſhall deviſe all the lands which he ſhall have at his death; but not further interfering with the rule: And to me it ſeems to have been done with great propriety; ſince ſuch an extenſive clauſe ſhews the teſtator to have contemplated any after purchaſed lands he may acquire, and that they ſhall paſs to his deviſee; whereas, without ſuch clauſe, he will appear to have had in view only his preſent poſſeſſions, leaving future acquiſitions to future proviſion, or to the diſpoſition of the law: And therefore where the power given by the act is not exerciſed by ſuch a clauſe, as is the preſent caſe, the rule operates, and after purchaſed lands will deſcend to the heir at law. It fol-

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lows that I am of opinion, with the other judges, that the decree ought to be affirmed.

WATSON,
against
POWELL,

What word paſs a fee in a will.

IN ejectment brought by Watſon againſt the Powell's, the jury found a ſpecial verdict ſtating. That Levi Watſon being on the day of *anno domini* 1776, ſeized in his demeſne as of fee in thirteen acres of land being the premiſes in the declaration mentioned and of no other viſible property or eſtate did on the day and year aforeſaid duly make and publiſh his laſt will and teſtament in writing, the material parts of which are as follows. "I Levi Watſon, have thought it ſuitable to ſet- "tle theſe my affairs on this ſide the grave, and "all this my *temporal eſtate*, which it hath pleaſ- "ed God to endow me with, which I will and re- "quire to be in manner and form following. I "give my ſoul to God &c. and all my juſt and law- "ful debts to be diſcharged in a legal manner &c. "2*dly*, *I give and bequeath unto my ſiſter Roſy* "*Watſon* 13 *acres of land adjoining the place call-* "*ed Bell-haven, to her, and* £ 2 15, *that is due* "*for the rent of the thirteen acres, and* £ 6 12 0, "*in the hands of Thomas Addiſon*, and I do ap- "point my brother in law Churchill Ames for to "be my whole executor, to this my laſt will and "teſtament. In teſtimony whereof I have here- "unto ſet my hand and affixed my ſeal, this 20th "day of September 1776." That the teſtator died in 1778, without iſſue, leaving William Watſon his brother and heir at law. That the ſaid William Watſon alſo died the ſame year, inteſtate, leaving the plaintiff, his ſon, and heir at law. That the ſaid Roſy Watſon entered on the lands, by virtue of the ſaid will, and was ſeized as the law requires. That ſhe married Littleton Addiſon, and together with him conveyed the ſaid lands, on the 26th day of March 1782, to Under-

hill. That she died in 1795. That Underhill conveyed to Henry, who devised it to Susanna Henry, who intermarried with Stratten; and with him conveyed to James Powell, who devised it to the defendants. The District Court gave judgment for the defendants; and the plaintiff obtained a writ of supersedeas thereto from this court.

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CALL for the plaintiff contended that the devise to Rosy Watson, carried only an estate for life; that the reversion, after her death, descended on William Watson the heir at law; and that the plaintiff claiming under him, became entitled to the land, on the death of the devisee for life.

GEORGE K. TAYLOR for the defendant insisted that the question was completely decided by the cases of *Kennon* vs. *M'Roberts*, 1 *Wash.* 96, and *Davis* vs. *Millar*, 1 *Call*, 127: Particularly the latter, in which it was held, that the word *estate* might be taken from the preamble, or other parts of the will, and united to the devise, so as to convey a fee.

Cur. adv. vult.

PENDLETON President delivered the resolution of the court as follows:

This was an ejectment brought in the District Court of Accomack, by Watson against Powell, for 13 acres of land, in that county; in which there is a special verdict, stating that Levi Watson being seized in fee of the lands in question, and having no other visible property, made his will, in 1776; wherein, after declaring in the preamble, that he thought it suitable to settle his affairs and all this his temporal estate, which he wills and requires shall be in manner following: He devises the land in question, with two small sums of money, to his sister Rosy Watson, and made no other bequest. That he died without issue, and the plain-

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tiff is his nephew and heir at law. That Roſy Watſon; the deviſee, intermarried with Littleton Addiſon, and with her huſband, by deed in 1782, conveyed the land to Amos Underhill, under whom the defendant claims. Upon this verdict the Diſtrict Court gave judgment for the defendants, and to that judgment there is a ſuperſedeas.

Altho there are no words of limitation in the deviſe, yet it has been decided in this court, conformably to modern deciſions in England, that the word *estate* in the preamble, ſhall be incorporated in the deviſe, and paſs a fee. In *Kennon* vs. *M'Robert*, I delivered my opinion fully on this point, the other judges ſuſpended theirs, as unneceſſary, all concurring in opinion that the reſiduary clauſe, in that will, did not comprehend the reverſions, if there were any; but ſubſequent judgments have confirmed the opinion I then delivered, on the point; which is conſidered as ſettled; and on that ground, there is no error in the judgment.

We diſcover an apparent defect in the defendants title, as Roſy Addiſon does not appear to have been privily examined. This however, may not be real (ſince the clerk's certificate of the probat is not annexed to the deed;) but whether ſo, or not, is of no importance, upon this verdict, as the leſſor of the plaintiff, who muſt recover upon the ſtrength of his own title, is not ſtated to be heir at law, to Roſy; who, for any thing which appears to the contrary, may have left children. Upon the whole the judgment is affirmed.

ROSS *against* OVERTON.

THE Overton's brought debt againſt Roſs, upon an arbitration bond, and declared for £6000, on a bond dated the 25th day of——in the year 1784, and conditioned for the performance of an award, concerning the payment of the rent and putting ſome improvements on a tract of land, merchant mill and fiſhery of the plaintiffs, which had been leaſed to Roſs, ſo as the award was made ready to be delivered to the parties on, or before, the 15th day of of June thence next enſuing. The declaration ſtates an award, as follows:

"Bonds having been entered into by Elizabeth "Overton and Richard Overton of the one part, "and David Roſs of the other part, dated the 22d "day of May 1784, whereby the ſaid parties bind "themſelves mutually to abide by and perform the "award and arbitrament of Joſeph Jones, James "Madiſon and Henry Tazewell, Eſqrs; arbitra- "tors, indifferently choſen by them of and con- "cerning a controverſy ſubſiſting between them "relative to a leaſe or agreement made and enter- "ed into the 24th day of Auguſt 1783, between "Richard Morris on behalf of the ſaid Elizabeth "and Richard Overton, and the ſaid David Roſs, "reſpecting a tract of land, a merchant mill, fiſh- "ery &c. adjoining the city of Richmond, as is "particularly ſpecified in the ſaid leaſe or agree- "ment, ſo as the award be made and given up in "writing, under their hands and ſeals, on or be- "fore the the 15th day of June next enſuing, the "date of the ſaid bond. We, the arbitrators a- "foremention'd, have met and conſidered the "leaſe or agreement aforeſaid, and we find that in "the ſaid leaſe or agreement the following ſtipu- "lations are contained. After the ſaid Roſs ac- "cepts of a leaſe of the land, adjoining Richmond, "a griſt mill thereon, canal, fiſhery &c. and all "other advantages and conveniences of what kind "ſoever attendant thereon, he covenants as fol- "lows. That he will make the improvements

Variance between the date of the bond declared on, and that recited in the award is not fatal if they agree in every other particular; that is to ſay; if the bond declared on have the month blank, and the award recites the month, it will not be fatal if the bonds agree in other reſpects.

O. leaſed a mill & premiſes to R; who covenanted to leave it in repair. The mill during the leaſe is carried off by ice, R. is bound to pay the rents, and perform the covenants

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" herein after named, to wit, a convenient bake-
" houſe, two ſtories high, with three ovens, a
" miller's houſe, 32 by 16, one ſtory high with
" two chimneys of ſtone or brick, lath'd and plaiſ-
" ter'd, and finiſhed in a workmanlike manner, a
" kitchen, 16 by 16, with a ſtone or brick chim-
" ney, a ſtable of convenient ſize, and alſo a coo-
" pers ſhop: That he will open the canal, extend
" and improve it, ſo as to admit a plentiful ſupply
" of water, as far as the ſituation and plan of the
" ſaid mill will admit with convenience, to pay
" taxes, and to deliver the ſaid mill, together
" with the improvements aforeſaid at the expira-
" tion of the ſaid term of ſeven years, in proper
" tenantable repair. It appears by the admiſ-
" ſion of each party, that in January 1784, by an
" extraordinary and unexpected movement of the
" ice, the mill houſe was entirely demoliſhed,
" and the ſaid Roſs had it not in his power to pre-
" vent the ſame. In purſuance of the ſubmiſſion
" aforeſaid, we the ſaid Joſeph Jones, James Ma-
" dion and Henry Tazewell, do award and deter-
" mine that the ſaid David Roſs ſhall pay the rents
" reſerved in the ſaid leaſe or agreement, notwith-
" ſtanding the accident aforeſaid, and that the ſaid
" David Roſs ſhall comply with and perform the
" other covenants contained in the ſaid leaſe."
Pleas *conditions performed;* and *no award*: Iſſue on both; and then the record, after ſtating that the jury were ſworn, proceeds thus:

" The declaration on which the ſaid iſſues were
" joined, ſtated the date of the bond to be the 25th
" day of ——1784; and after the jury were ſworn
to try the ſaid iſſues, the counſel for the plaintiff
" with the aſſent of the defendant's counſel, a-
" mended the ſaid date, at the bar, ſo as to be the
" 22d day of May 1784; but the counſel for the
" plaintiffs, having thereupon ſuggeſted that the
" amendment was made thro miſtake, moved that
" the date of the ſaid bond ſhould be reſtored to
" what it originally was, when the jury were ſworn
" to wit, the 25th day of—— 1784; which moti-

" on was oppoſed by the defendants counſel, but " granted by the court."

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Verdict for the plaintiffs upon both iſſues; and the defendant moved to arreſt the judgment:

1ſt Becauſe no date to the writing obligatory in the proceedings mentioned is ſet forth in the declaration, the month in which it was executed not being therein ſtated. 2d, For that the award appears on the face of it to have been made on a different obligation from the one declared on. 3d, For that the breach of the condition of the writing obligatory in the proceedings mentioned, is not ſet forth with ſufficient certainty.

The Diſtrict Court entered Judgment for the plaintiff; and Roſs appealed to this court.

HAY for the appellant. There is a variance between the bond declared on, and that recited in the award: For the declaration ſtates the date as of the 25th day of 1784, and the award as of the 22d day of May 1784. This miſrecital is fatal, *Turner* vs *Moffet*, 2 *Wash.* 71. For the declaration ſtates the breach in not performing an award made upon another bond, than that ſtated in the declaration: Which latter, according to this record, is not alledged to be violated.

DUVAL on the ſame ſide. The award ſtates the facts; and it is evident, that the arbitrators have drawn an inference, from thoſe facts, erroneous in point of law. For the injury done to the premiſes was owing to the act of God, which excuſed the covenant. Thus if a houſe fall by tempeſt, it is not waſte in the tenant. So if there be a contract for the purchaſe of a houſe, which is burnt before a conveyance, the purchaſer will not be bound to pay the purchaſe money, *Stent* vs *Bailis*, 2 *Eq. cas. ab.* 689; and there are various inſtances where it has been held that inevitable

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accidents will excuſe the tenant, 1 *Term rep.* 708 33. It is like the caſe of a common carrier, who, though generally held to ſtand inſurer, is yet excuſed by the act of God. 1 *Term rep.* 28. The arbitrators, therefore, were clearly miſtaken in their inference from the facts; and the court may relieve againſt it. *Jerdone* vs *Holt*, in this court.

WICKHAM on the ſame ſide. The court may correct the error in the opinion of the arbitrators, as it appears from the face of the award. 1 *Wash.* 158, The ſum awarded is aſſeſſed upon all the covenants, and not for the rent only.

CALL *contra.* The recital in the award of the date of the bond does not vitiate. 1. Becauſe it is true: For the defendant does not ſhew any other bond; and therefore it muſt, neceſſarily, apply to this, as the court will not preſume any other. 2. Becauſe the ſubſtance of the bond and award agree; which proves the reference was to this very bond, and to no other: And it is enough if by reference it can be aſcertained, *Deane* vs *Cunliffe*, in this court. M. S. The names of the parties, the ſums, and the principal matters of the bond appear in the award; which ſufficiently identifies the bond refered to. 3. Becauſe the arbitrators have found the true date of making a bond, which bore an uncertain date: thus rendering that certain, which was uncertain before: And they, clearly, had a power to do ſo. For arbitrators may find the true date, in the ſame manner as a jury; who are not bound down to the date expreſſed in the inſtrument, but may find the actual date; which is the day of the delivery. For where ever the date is uncertain, void, or omitted, it may be ſupplied by pleading, or finding, 1 *Lord Raym.* 335, 6 *mod.* 244. 2 *Co.* 4 *Goddards caſe.* 1 *Nels. ab.* 388. 4. Becauſe there is no repugnancy, between the date expreſſed in the bond, and that recited in the award. For it ſtates that the bond

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was *dated*, and not that it *bore date*, on the 22d of May 1784: But it is the delivery which conſtitutes the date, and not the expreſſion in the bond: So that the date is independant of the words; and therefore as it is ſubſtantive fact it may be found, without aſſailing the bond itſelf. Conſequently the ſtating the actual date, did not produce any inconſiſtency. 5. Becauſe, in caſes of this kind, the queſtion is not when the deed was made, but whether the party actually did make it? 2 *Co.* 4, *Goddards case*. 6. Becauſe the bond bears date in 1784; and the arbitrators merely add the time of the year: So that they cannot be ſaid to miſrecite; for the year, which is all the date contained in the bond, is truly recited; and the addition of the month will not prejudice; becauſe it comports with the bond, and does not produce a variance: Which is the only ground upon which miſrecitals are held to vitiate. 7. Becauſe the pleas admit the award. For the plea of conditions performed goes to the award ſtated in the declaration; becauſe, when he ſays he has performed the conditions of the bond, he virtually affirms, that he has performed the award, which is alledged to proceed from it. The ſame obſervation applies to the other plea, of *no such award* as that ſtated in the declaration. For, there, the plea goes to the award, which is alledged, expreſſly: After which, it is too late to object a variance between that, and the bond, *Hubbard* vs *Blow*, and *Brown* vs *Ross*, M. S. in this court. In this reſpect it differs from *Turner* vs *Moffet*, 2 *Wash.* 71: Becauſe, there was no ſubſequent plea, or admiſſion of the fact in that caſe. 8 Becauſe it has been expreſſly decided, that it does not vitiate. *Style* 87, *Allen* 87, 1 *Ventr.* 184: Which are concluſive as to bonds: and, therefore, even if *Turner* vs *Moffet* is to prevail in caſes of reference, ſtill, in the caſe of a bond, the award will not be avoided, by ſuch a miſrecital as this.

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The defendant was bound to pay the rents, and perform the covenants, notwithſtanding the act of providence.

A diſtinction has been ſometimes, taken, between a caſe, where the ſoil itſelf is carried away; and where the buildings and conveniences are deſtroyed, but the ſoil is left. In the former caſe the rent is ſaid not to be demandable, (as no act of the tenant could enable him to enjoy the property;) but in the other it is: Becauſe the tenant ſtill has the uſe of the ſoil, and may reſtore the conveniences with labour and pains. This diſtinction clearly operates in favour of the appellee in the preſent caſe; becauſe the tenant might rebuild the mill, and he has the benefit of the reſidue of the demiſe. Beſides, the rule is inflexible, that wherever there is an expreſs covenant to pay the rents, put repairs, or reſtore in tenantable order, there the tenant is bound by his covenant, and muſt perform it, at all events: And the want of enjoyment is not material; becauſe a man may covenant under ſeal, without a conſideration. *Allen*, 27. 2 *Stra.* 763. 3 *Burr.* 1638, 1640. 1 *Term rep.* 310.

NICHOLAS on the ſame ſide. Courts are more liberal in conſtruing awards now, than formerly; and the ſubject matter plainly ſhews that the award, in this caſe, was made upon the bond ſtated in the declaration; for that is certain, which can be rendered ſo. 2 *Bac. abr.* 218, and the date might be avered. The defendant cannot be received to object the variance at this time. For the award is ſtated in the declaration; the plea goes to it; and the jury have found it. If the defendant had choſen to have drawn the variance into queſtion, he ſhould have plead it. The caſe of *Turner* vs. *Moffet*, 2 *Wash.* 71. is not like this; 1ſt, becauſe there was no plea over in that caſe, as there is in this. 2d, Becauſe the award there

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contradicted a record. The iſſue in this caſe was whether the award was made in purſuance of the bond declared on? And the jury have found that it was; which is concluſive. It is not clear that the court can correct a miſtake of the arbitrators, if in fact they had drawn an erroneous inference in point of law. The caſe of *Jerdon* vs. *Holt*, I am not acquainted with; and that of *Roſs* vs *Pleaſants*,* was the caſe of a miſtake in facts. But if the court can make ſuch a correction, there is no ground for it in the preſent caſe. For the award does not ſtate the facts certainly enough to enable the court to do it. However, upon the merits, the law is in our favour; for the expreſs ſtipulations bound the defendant both at law, and in equity.

RANDOLPH on the ſame ſide. The variance is not material. The old authorities are clearly ſo; and they are approved of in *Kyd upon awards* 159. The caſe of *Turner* vs. *Moffet*, 2 *Waſh.* 71 does not apply; becauſe the award there contradicted a record: whereas this is merely a bond, which is matter *in pais* only. Beſides the caſe appears to have paſſed *ſub ſilentio*; and the jury here have found the fact. The arbitrators were not miſtaken in the legal inference. There were ſeveral other advantages beſides the mills, as the fiſhery, &c; which the defendant might have enjoyed, notwithſtanding the ice; and, therefore, the partial inconvenience ought not to excuſe him. Beſides we are in a court of law, where the legal covenants muſt prevail: For equitable circumſtances are of no weight in the preſent action. If the defendant ſuppoſes they are of any avail, he muſt apply to a Court of equity. But even there he perhaps would not be relieved. For although lord Northington, in *Brown* vs. *Quilter*, ſpeaks very liberally, yet he hints ſomething concerning the croſs action of the party, which would not apply here.

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here. The accident was a probable one, and yet no proviſion is made for it; which looks as if it was not conſidered, at the time, that he was to be relieved.

WARDEN in reply. There is a plain variance between the bond declared on, and that recited by the referees; which is ſufficient to avoid the award. The arbitrators were clearly miſtaken in the inference, which they drew from the facts: The parties did not intend it, and the law does not ſupport their deduction. *Landlords law*, 222. 1 *Inſt.* 53. This is a miſtake which ought to be corrected; and the court have the power to do it. *Kyd. aw.* 239..

WICKHAM on the ſame ſide. There was a variance between the bond declared on, and that produced in evidence. It is not true that you may declare on one bond, and give another in evidence. The difference is where the declaration ſtates, that the bond *bears date* on ſuch a day, and where it ſtates "that it is *dated*" on that day: In the firſt caſe you may prove, and the jury may find, a different date: But not ſo in the latter; becauſe the plaintiff, by ſtating the date in his declaration, admits it. Here the award recites a diſtinct bond, from that declared on; which is expreſſly within the caſe of *Turner* vs *Moffet*. And it ought to be ſo; for ſuppoſe the arbitrators had awarded on matters not in this, but another bond, ought their award to have bound? The pleas do not admit the award to have been made, in purſuance of this bond: The declaration does not ſay ſo; and therefore the plea cannot be conſtrued into an admiſſion of it. In the caſe of *Deane* vs *Cunliffe*, the court had the notice before them; and therefore could ſee that the award purſued the reference. Under every view then the miſrecital is an incurable defect. But upon the merits, the plaintiff is not entitled to recover. The accident could not have been prevented by Roſs: The covenants could not be enforced upon the principle of

natural law; and a court of equity would relieve againſt it, as is clearly proved by the caſe of *Brown* vs *Quilter*, *Ambl.* 619. Beſides, if the ſtrict letter of the covenant is urged, we may inſiſt, that the plaintiff covenanted for our quiet enjoyment againſt all interruption or moleſtation; which includes the accident, that has happened.

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Cur. adv. vult.

At the requeſt of Pendleton Preſident, Roane Judge delivered the reſolution of the court as follows.

In this caſe two objections have been made to the judgment of the Diſtrict Court.

1ſt, That there is a variance between the award and the bond of ſubmiſſion ſtated in the declaration, the former referring to a bond dated the 22d of May 1784, and the declaration, ſtating the bond in ſuit to be dated the 25th of 1784: In ſupport of this objection the counſel principally relied on the caſe of *Turner* vs *Moſſet*, in this court, reported in 2 *Wash.* 71: But that caſe does not apply; ſince the variance was apparent on record, againſt which no averment is admiſſible; and it was truly obſerved, by the Attorney General, that that caſe was diſtinguiſhable from the preſent, which being a bond for the ſubmiſſion, was a matter *in pais*, and the ſuppoſed variance might be corrected by averment. The declaration ſtates, that the defendant on the 25th day of 1784, by obligation, the date whereof is the ſame day and year, bound himſelf to the plaintiffs: In the breaches aſſigned, annexed to the declaration, after reciting the leaſe to the defendant, and its eſſential covenants on his part, and that differences had ariſen, which the parties had mutually agreed to refer to arbitration, the plaintiffs aver that they entered into a bond, ſimilar to

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that entered into by the defendant, to abide by the award; and that the defendant, *on the ſame day*, to wit, the day of 1784, executed the bond in the declaration mentioned. It is obvious, from the award, that the arbitrators had before them, not Roſs' bond, but that entered into by the plaintiffs; which they ſay is dated the 22d of May 1784. Without going over the ſeveral caſes cited, the rule laid down, in 1 *Ld. Raym* 335, ſeems to have run thro them all; that is, that, if a bond hath either *none*, or an impoſſible date, the plaintiff may aver any day, which he can prove the bond to have been delivered on. The preſent caſe is that of no date to the bond (for the counſels curious criticiſm, referring the 25th day of ſomething to the day of the year, was calculated only to occaſion the mirth it produced.) We conſider that, as well as the blank date averment, to be no date: and of courſe, there is no variance between that and the true date mentioned in the award, in every other thing, in parties, controverſy, and arbitrators, they agree: And, on this point, there is no error in the judgment of the Diſtrict Court.

The ſecond objection is to the award itſelf. On this point, it was argued by Mr. Wickham, that under the covenant for quiet enjoyment, the Overtons were the inſurers of the property againſt all accidents; but ſurely that covenant which does not differ eſſentially from others of a like kind, only obliges the leſſor to defend the enjoyment of the leſſee againſt *legal* claims, aud not againſt a *ſeparation of continuity*, robbers, thieves, treſpaſes, or the ice, as was ſaid by the counſel. But it was argued that where it is apparent in the award, that the arbitrators decided upon principles, in whichthey were miſtaken, either, in law, or fact, the court will ſet aſide the award: And that they were ſo upon the preſent caſe; ſince it being ſtated that the mill-houſe was entirely demoliſhed, by an extraordinary, and unexpected movement

of the ice, which Roſs had it not in his power to prevent, they miſtook the law, when they awarded that he ſhould pay the rent, and perform his other covenants in the leaſe, notwithſtanding the accident.

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For the ſake of precedent the court firſt conſidered how far they ought to interfere with awards, upon this ground; and are of opinion that they ought not to conſider themſelves as an appellate court from the judgment of the arbitrators, and reverſe it, merely becauſe we differ in opinion from them, on a doubtful queſtion; but ought to place ourſelves in the ſtate of a court applied to, to grant a new trial, becauſe the verdict is contrary to evidence; which ought to be granted only in caſe of a plain deviation, and not in a doubtful one, merely becauſe the court, if on the jury, would have given a different verdict; ſince that would be to aſſume the province of the jury, whom the law has appointed the triers. This rational diſtinction between *plain* and *doubtful* caſes, is obſerved in the books which juſtify the courts in ſetting aſide awards for miſtaken principles: That this was, at leaſt, a doubtful queſtion, is evinced, not only by the number of counſel employed to diſcuſs it, but from the Engliſh deciſions on the ſubject; and on this ground we think the Diſtrict Court did not err on this ſecond point; at the ſame time obſerving, that ſtating it as a doubtful caſe, cannot be complained of by the appellant; ſince, on the merits, it is our preſent opinion, that the arbitrators did not miſtake the law. The judgment is, therefore, affirmed with coſts.

MILLS, *againſt* BELL.

Where the title to part of the lands purchaſed, during the paper money age, but not conveyed, was evicted; And owing to the laches of the purchaſer, in not punctually paying ſome of the laſt inſtallments, the vendors executor was prevented from purchaſing the evicted lands, this court decreed a conveyance of the lands not evicted, and proportioned the loſs ariſing from the eviction on the whole purchaſe money: Inſtead of making the vendors eſtate liable for the value of the land at the time of eviction; which would have been the rule if there had been a conveyance with warranty.

JOHN MILLS as heir and deviſee of Robert Mills, filed a bill in the High Court of Chancery againſt Joſeph Bell as executor of David Bell and the executors of Robert Mills, ſtating that Robert Mills purchaſed of David Bell, in his life-time, two tracts of land, one of 210 acres, and the other of 100 acres, for the ſum of £500; of which 220 had been paid, £120 were tendered at the time the ſame fell due, and the payments of the reſidue ſuſpended, until a title to the lands aforeſaid ſhould be made. That a judgment was afterwards recovered, by one Francis, againſt Robert Mills, for the 210 acre tract. That the defendant has refuſed to make the plaintiff a title for the other tract, or to compenſate him for the value of that recovered. The bill therefore prays for a conveyance of the 100 acre tract; reparation for the other, and for general relief.

The agreement, which is referred in the bill, after reciting the names of the parties, ſtates that "the ſaid David Bell hath ſold, unto the ſaid "Mills, the two tracts of land, which he bought "of Ro. Wylie and John Frances, except a neck "of about 20 or 30 acres, of Wylie's tract, which "ſaid Bell ſold John Hall. Captain Bell agrees "the land ſold, to contain 300 acres. Robert Mills "covenants to pay him £500 Virginia money for "the ſame, in manner following, £100 immediately down; £60 next November; and £60 "every year following, until the ſaid 500 is fully "paid. Captain Bell promiſes to make Robert "Mills a ſufficient title next November. They "do hereby bind themſelves and heirs, unto each "other, in the penal ſum of one thouſand pounds, "under their hands and ſeals, this 20th of Febru-"ary 1778."

The anſwer of Bell ſtates, that Robert Mills, about the 15th of June 1781, offered him £60

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in paper money, as one of the inſtallments, which, not finding any papers relative to the ſale of the land, he declined taking, till he ſhould be better adviſed. That in December 1781, the plaintiff offered him £120, ſaying it was for two other inſtallments then due; which the defendant propoſed to accept, if he would pay the balance in ſpecie, but the plaintiff declined it. That the defendant afterwards, offered, if all the money was paid, according to the ſcale, to give his own bond for the title of the whole land, as he had reaſon to believe he could purchaſe the 220 acre tract of Francis; but the plaintiff ſaid he could not pay the whole money, although he ſhould never aſk a title, until he paid up the money, according to the inſtallments. That the defendant has never refuſed to convey the 160 acre tract, if he could ſettle as to the other.

A witneſs ſays, that, in a converſation between the plaintiff and defendant, the latter ſaid, if the former would pay the money, he thought he was ſtill able to make a title to the land; and that the plaintiff tendered the amount, in ſpecie according to the ſcale.

Some other witneſſes ſpeak about the tenders &c. and there are receipts for four payments of £60 each.

The county court decreed a conveyance of the 100 acre tract, and compenſation for the tract which was recovered by Francis. From which decree the defendants appealed to the Court of Chancery, where, by conſent of parties, the decree was opened, the ſuit retained, and ordered to be proſecuted as an original ſuit. Whereupon a new bill and anſwer were filed, and ſome new depoſitions taken, which did not materially alter the caſe. The Court of Chancery upon the hearing directed an iſſue to aſcertain the value of the the lands; and, upon the return of the verdict,

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affirmed the decree of the county court, as to the conveyance of the ſmall tract, but reverſed it, as to the reſidue, and diſmiſſed the bill. From which decree of reverſal Mill's appealed to this court.

CALL for the appellant. The plaintiff ought to have a decree for the ninety acres, and damages for the loſs of the 210 acres. That the payments actually made, were in paper money; two other inſtallments tendered in that meduim; and the balance offered according to the ſcale, only; are circumſtances which will not affect the caſe: Becauſe the plaintiff performed his contract throughout; for he ſtipulated for the currency of the country, and therefore ought to have the benefit of the contract, on payment of that kind of money. In this reſpect it differs from the caſe of *White* vs *Atkinson*, 2 *Wash.* 94; becauſe there the purchaſer had wholly neglected to perform the engagements, on his part; which was the foundation of the courts opinion in that caſe; for having failed to perform himſelf, the court could deny its aid, unleſs upon equitable terms. But here no injuſtice will be done, as the appellant has not been guilty of any neglect to the injury of the ſeller. For the contract was made, when paper money was current, and it was current alſo, at the time of payment, and of the tender: So that what he contracted for, he actually received, and had tendered to him. It therefore reſembles the caſe of *Talliaferro* vs *Minor*, 1 *Call* 524; in which the difference, between performance and non performance by the purchaſer, was diſtinctly admitted. Ofcourſe, that caſe regulates this, unleſs the purchaſer having been a defendant and not a plaintiff, there, may be ſuppoſed to conſtitute a difference. But that circumſtance ought not to alter the caſe, if the plaintiff has fulfilled his contract, without any negligence, or fault; for having performed the contract himself, he has a right to inſiſt on fulfilment by the vendor. The decree, therefore, ought to have been founded on the paper money

contract, and, of courſe, damages, according to the verdict of the jury, ought to have been allowed; that is to ſay, the 90 acres ſhould have been deducted at its value by the verdict, and the balance of the verdict decreed, after a rebatement of the purchaſe money, according to the ſcale.

WICKHAM *contra*. The caſe does not depend on precedent, but upon immutable principles; for a court of equity may retain, or diſmiſs bills, at its diſcretion; and there is nothing which entitles the plaintiff to favour, in the preſent caſe. It does not appear that he has laid out money in improvements, or been put to inconvenience in conſequence of the purchaſe. He aſks ſtrict law, and therefore ſhould ſhew performance on his own part. He does not do ſo, however; for there was not only a failure to tender ſome of the payments on the day, but the bill actually ſhews a ſuſpenſion of payments. If the injury is compenſated for, at all, it ſhould be at the time for conveying the complete title; and not at the time of the verdict. But why ſhould the plaintiff receive damages, as he was not to pay for the deficiency? In this view of the caſe, the commiſſioners report ought to be corrected, having regard to the balance of the unpaid purchaſe money. The caſe does not reſemble *Taliaferro* vs *Minor*; becauſe, there, all the purchaſe money, but the ſhares of the purchaſers, was actually paid; and the purchaſers did not come into equity to aſk a favour, ſo as to enable the court to lay them under terms; for they were defendants to the cauſe.

CALL in reply. With reſpect to the damages, the verdict affords the faireſt rule; becauſe the queſtion, was, probably, more fully inveſtigated, at that time. But, if this be rejected, the report of the county court commiſſioners, which is expreſſly declared to be for the damages ſuſtained, and therefore in the nature of a verdict in an action for breach of the contract, ought to be taken as a

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measure of the damage. There was no default in Mills as to his payments: Several were actually made, and two others tendered: And, although it does not appear that the tender for the £60 due in 1781 was made on the very day, yet that may have arisen from the death of the seller, and the delay in his executor to qualify; which is the more presumable, as no objection appears to have been made, on the ground of the failure to pay, at that day.

Cur adv. vult.

PENDLETON President delivered the resolution of the court as follows.

The foundation of this suit is an agreement entered into, in February 1778, between David Bell and Robert Mills, both since dead, by which Bell agreed to sell to Mills, two tracts of land, which he bought of Wyle and John Francis; which he agreed should contain three hundred acres, and for which he was to make Mills a sufficient title the next Nov. Mills was to pay £500 *Virg.* money, & £100 down, £60 the next Nov, & £60 every year following, until the whole was paid. The prompt payment was made, and so were those of Nov. following, and that of November 1779, but none of the subsequent payments were made. That for the £60, payable November 1780. was tendered, in June 1781, when the depreciation, according to the scale had increased from 74 to 250, and, in December 1781, that £60, and the £60 for November 1781, were tendered; when either the paper was called out of circulation, or which is the same thing, the scale was at 1000 for one. If the subsequent payments had been made in specie, Bell would have been made amends for former disappointments; and there appears some reason to suppose such was the intention of the parties, but it is not so sufficiently proved as to be the ground of a decree. The depositions prove

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the tender of the paper money, and two witneſſes ſay that whilſt the ſuit of *Francis* vs *Mills* was depending, in converſation, Joſeph Bell ſaid if Mills would parade the money, he thought he was ſtill able to make a title to the land; and, after that ſuit was tried, Bell told Mills, the plaintiff, that, if he would comply with his uncle's agreement, he was willing to receive the money; upon which Mills ſaid here is your money, agreeable to the ſcale, if you will make me a title; Bell replied you are going to take advantage of me, and haſtily went out of the room; upon which Mills put a ſum of ſpecie into the hands of one of the witneſſes, who counted it, and found it ſufficient to diſcharge the debt, according to Mill's report of the amount, but the ſum is not mentioned. This evidence of a tender is too uncertain to enable the court to ſay that the non-payment was owing to the creditor, ſo as to relieve the debtor under the 5th ſection of the ſcaling act. And, upon the whole, the contract is to be adjuſted according to the 2d ſect. of that act. It appears that Bell had not paid for the land purchaſed of Francis, nor obtained a conveyance; that Francis, by ejectment recovered 210 acres of the 300 ſold to Mills, who retained only 90 acres; and that even this was not conveyed to him by Bell. Upon which the plaintiff, nephew and heir of Robert Mills, in 1780, commenced this ſuit againſt Joſeph and Florence Bell executors of David Bell, and William Bell his heir, at law, to have a conveyance of the land, and an indemnification for all loſſes ſuſtained, or to be ſuſtained in conſequence of the breaches of the agreement, on the part of Bell: Joſeph Bell alone anſwers the bill, which is taken for confeſſed as to Wm: Bell, the heir at law; a replication is filed, and the depoſitions of witneſſes taken: Upon the hearing, a decree is made, that William Bell the heir ſhould convey to Mills the 90 acres, and that the executor of David Bell ſhould pay to Mills what ſhould be recovered for the meſne profits of the 210 acres upon a ſuit then depending; and

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commiſſioners were then appointed to value the 210 acres recovered, & to enquire what injury Mills had ſuſtained, from the reduced value of the remaining 90 acres. The commiſſioners having reported that the value of the lands recovered, and the damages, were £185. The court decreed, that Bell's executors ſhould pay the ſame, and that the cauſe ſhould be continued, till the action for the meſne profits was determined; which they afterwards ſay was decided by a verdict for Francis for £6 and coſts: And their final decree is, that the heir convey the 90 acres, and the executors pay the £185, the £6 for meſne profits, and £9 9 6 for coſts; and, alſo, the coſts of ſuit. On an appeal to the High Court of Chancery, by conſent of parties, the ſuit was retained, to be proſecuted as an original ſuit: A new bill and anſwer of Joſeph Bell were, filed, and ſeveral witneſſes examined; which do not ſeem to change the caſe materially, from what it was, in the county court. The Chancellor directed an iſſue, to be made up, and tried in the Diſtrict Court of Staunton, to aſcertain the value of the lands, mentioned in the articles of agreement: The jury's verdict upon that iſſue is, "that the whole land is worth £634 10, the 90 acres worth 6 dollars an acre, and the 210 worth 7½ dollars an acre." On the hearing, the Chancellor affirmed the decree for the conveyance of the 90 acres, but reverſed it as to the reſidue, and diſmiſſed the the bills, with coſts in that court. He afterwards reverſed this decree, on a new argument, from which there is an appeal to this court. The firſt point which preſents itſelf to the conſideration of the court is, by what ratio the compenſation to be made to Mills for the land evicted, is to be adjuſted? Whether the value of them at the time of eviction, or at the time the purchaſe was made? The former would be the rule, if a conveyance had been made with warranty: ſince the purchaſer is entitled on the covenant to the increaſed value of the eſtate, as well as for any improvements he may have made on it. But when, as in this

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caſe, the contract is executory, a court of equity will adjuſt it upon principles of equity according to the circumſtances: And ſince Mills appears to have been faulty in his payments, which, if regularly made, might have prevented the loſs, it ought to be adjuſted by proportioning the loſs to the value of the whole purchaſe money, for the whole land. A rule which does not appear to have been obſerved in either of the courts below. In the county court they gave the preſent value of the land loſt, and that without even deducting the balance of the purchaſe money; and the Chancellor has diſſmiſſed the bill as to the compenſation, without allowing Mills for the money overpaid for the 90 acres, or his coſts in defending the ſuits by Francis.

This court having fixed the rule of compenſation, and that the contract is ſubject to the legal ſcale, proceeded to adjuſt the diſpute between the parties, in this manner: The £500 purchaſe money reduced at 5 for 1 is £100; the proportion of 210 acres loſt ſo reduced is £70, leaving £30 ſpecie to be paid for the 90 acres. Mills paid £220; which, reduced by the ſame ſcale, is £44; ſo that he overpaid £14, in November 1779; which he is certainly intitled to recover, with intereſt. The meſne profits and coſts are rejected, becauſe he received the profits himſelf, and ſhould have paid them, without ſuit. The damages for his diſappointment are alſo rejected; becauſe, if he had been punctual in his payments, the title of Francis might have been purchaſed in, and a loſs prevented, Therefore the decree of diſſmiſſion ought to be reverſed with coſts, and a decree entered for Mills for £28 (being the £14, & intereſt for 20 years;) and the decree, as to the conveyance of the 90 acres, affirmed. The coſts, in both courts, in chancery to be borne equally by the parties.

Miller, vs Bell.

The decree was as follows:

"The court is of opinion, that the purchaſe "money, agreed to be paid by Robert Mills, for "the lands in the proceedings mentioned, ought "to be reduced to ſpecie according to the legal "ſcale at the time of the contract, ſince none other "appears to have been contemplated by the par- "ties at the time, and that, as the contract re- "mained executory at the time the appellant was "evicted of part of the land, ſince it is probable "that the title of Francis might have been pur- "chaſed in, and the diſpute avoided, if Robert "Mills, or the appellant had been punctual in "their payments, the compenſation to the appel- "lant for the loſt land ought to be adjuſted accord- "ing to the value at the time of the agreement, "of which there is no evidence, except the con- "ſideration agreed to be paid, which therefore "ought to be the rule; and that proportioned ac- "cording to the quantities of the lands loſt and "ſaved, which allots to the land loſt ſeventy "pounds ſpecie, and to the ninety acres ſaved, "thirty pounds, and the appellant having paid two "hundred and twenty pounds, which reduced "amounts to forty four pounds ſpecie, by which "fourteen pounds are overpaid for the ninety "acres, that ſum, with intereſt, ought to have "been decreed to the appellant, and the decree "of the High Court of Chancery is erroneous in "diſmiſſing the appellants bill as to that claim "with coſts: The claim of the appellant for the "meſne profits recovered by Francis is rejected, "becauſe thoſe profits were received by the appel- "lant himſelf, and he ought to have paid them "without ſuit. Nor is he entitled to damages for "diſappointment in the loſs of the land recovered, "ſince it probably was occaſioned by his own de- "fault; and that there is no error in the reſidue of "the ſaid decree. Therefore it is decreed and "ordered, that ſo much thereof as reſpects the "conveyance of the ninety acres of land be affirm-

" ed; and that the residue be
" court proceeding to make s
" residue so reversed, as the
" cery should have pronou
" decreed and ordered that
" said David Bell, out of his
" to be administered, pay t
" aforesaid sum of fourteen p
" thereon for twenty years,
" the county court and the
" Chancery, be equally born

Sevillants mitte[illegible] Tinsley, vs Anderson.

330 Tinsley, vs Anderson.

TINSLEY,

against

ANDERSON.

In what order debts against an insolvent debtor, who is living, are to be paid.

NELSON ANDERSON brought a suit in the High Court of Chancery, against various persons having mortgages from Richard Anderson upon lands, slaves, and personal property. The bill charges, that the said Richard Anderson hath incumbered his whole estate to the defendants; that the property in mortgage, is more than sufficient to pay the debts due the mortgages, and praying that the same may be sold, the mortgages paid, and that out of the balance a sum for which the plaintiff is bound, as security for the said Richard Anderson, may be paid, the plaintiff being unable to obtain redress any other way.

The answer of Richard Anderson, filed September, 1796, states, that it will be highly ruinous to him, if, in order to pay the plaintiff, the mortgage property should be sold for satisfaction of so many debts at once. That he has a reasonable expectation of raising the money, before the next year's crop is finished, and is desirous that the plaintiff should be paid by a sale at that time, if not paid before.

Miller, vs Bell.

The ...ral other creditors filed bills, and were ad...ed parties plaintiffs.

The debts consisted of mortgages, judgments, (some of which had been satisfied out of the effects of the securities thereto, but those securities had never been repaid by Anderson,) bonds, and open accounts.

In March 1797, the Court of Chancery decreed a sale, and, in March 1799, ordered the proceeds to be applied, first to discharge the mortgages, and judgments according to priority, and the residue among the other creditors proportionally, and the commissioner was ordered to take an account. In March 1800, the distribution was ordered to be carried into effect. And thereupon Tinsley appealed to this court.

WICKHAM for the appellant. Three objections to the decree occur in this case. 1. That the report is not certain enough to enable the commissioners to proceed. 2. That as there are separate mortgages, and specific liens, they ought to be considered separately, and not blended together; but each lien ought to be satisfied according to its date. Therefore the commissioner ought to have reported the date of each judgment and mortgage. 3 That securities are suffered to take preference of specific liens. Thus Woodson, without any lien, is prefered to judgment creditors; although it was decided, in *Eppes* vs *Randolph*, 2 *Call*, 125 that an expired judgment constituted no lien; and although the contest, here, was not between the debtor and the creditor, only, but between the latter and other creditors having equal equity: In which case, they ought to be permitted to retain their legal advantages. Of course Tinsley having a legal right, ought to take preference in the distribution.

DUVAL *contra*. There is no impropriety in the direction, for the first mortgage is to Ander-

Tinſley, vs Anderſon.

ſon; and of courſe, according to the appellants own principles, it ought to be preferred. The ſecurity, having paid off the judgment, ought to be ſubſtituted in the room of the creditor, and to take his preference.

Cur. adv. vult.

PENDLETON Preſident. The court doubt whether judgment, creditors, or ſureties, *who are to be placed in their ſituation*, are to be paid by priority, or rateably out of the general fund? But they doubt alſo on a more important queſtion, whether in this caſe, where equity is applied to, to diſtibute the funds of a living debtor, the legal preference of debts according to dignity, in diſtributing legal aſſets of the dead, ought to give the rule, or that of chancery in the diſtribution of equitable aſſets?

On theſe points we wiſh to hear counſel.

WICKHAM. They are not to be conſidered as equitable aſſets; but as property generally, ſubject to legal conſequences. Therefore the firſt mortgages are to have preference over all other claims, and the judgments next; even againſt ſubſequent mortgages. Of judgment creditors thoſe prior in time have the preference where they can ſue *Elegits*; but where they cannot, they are to be poſtponed to thoſe who can. *Eppes* vs *Randolph* 2 *Call*, 125. After theſe two claſſes are ſatisfied, bond and all other creditors, without liens, are to be paid *pro rata*, 1 *Pow. mortg.* 163. The mortgages not recorded, fall within the latter claſs; becauſe, againſt creditors, they are void as mortgages. With reſpect to the ſecurities, they will have the advantage where the mortgages and judgments remaining unſatisfied; but not where they have been diſcharged. Several of the creditors are defendants, and are not aſking any favour of the court; they therefore cannot be bereft of any

Tinsley, vs. Anderson.

legal advantage which they may have.

DUVAL. Where the bond creditor comes as plaintiff to ask equity, he will be postponed to mortgages, and judgments; because he has no lien, 2 *Vern.* 525. The securities are to stand in the room of the judgment creditors, and to have the same liens, as they might compel an assignment of the judgments, 2 *Vern.* 608. *Eppes* vs *Randolph*, 2 *Call*, 125.

WICKHAM. The difference between this case, and that of *Eppes* vs *Randolph* is, that in this, some of the judgments have been completely satisfied; but in that, the bond was not discharged; for there was only a decree in chancery, which had not been fully paid: So that Randolph's representatives might have been sued upon the bond itself.

Per. Cur. The court is of opinion, that the decree aforesaid is erroneous in this, that it directs the commissioners of sale to assign bonds to such creditors who had incumbrances upon the lands by mortgages, and creditors by judgments allowing prior satisfaction to prior demands, leaving to the said commissioners the power of judging what was the force of the different incumbrances, and their operation upon the different funds, which should have been decided by the court, and specific sums decreed to each claimant to be paid out of his appropriate fund; that the claims ought to be adjusted upon the following principles, that is to say: The mortgage to William Anderson is legally proved; but he appearing to be fully indemnified, except as to twenty shillings, that sum together with the money paid by John Woodson, another security, to Charles Thompson in part of his judgment, ought to be first paid out of the money for which the land conveyed by the said deed was sold; and the residue of that sale to go into the general fund. That the mortgage to John Fox being for person-

als only, is of no consequence, but he is to be considered as in the place of William Johnston, who is a creditor by judgments. All the other conveyances stated in the record, not being proved and recorded according to law, are void as to creditors, and those meant to be benefited thereby are to be considered as specialty creditors at large, except where they have judgments so as to be arranged in that class. That all the creditors by judgment or decrees, ought to be paid out of the general fund, according to the priority of recovery, with this reservation, that when a prior creditor shall not have received his money of securities, or sued out execution on his judgment within a year, he shall yield priority to subsequent judgments, on which executions shall have been so issued, or the money received of securities. In both instances of the money paid by securities, as well as in all other instances, securities ought to be placed in the situation of the creditors they shall have paid, or be bound to pay. That the remaining funds, if any, shall be distributed, *pro rata*, among the several creditors who have no lien upon the lands. And that the bond to Dorothy Johnston, appearing to be dated above twenty years before it was exhibited, is to be presumed paid, and rejected, unless William Johnston, having notice, shall give to the said Court of Chancery, satisfactory reasons to avoid the said presumption. The decree therefore is to be reversed, and the court proceeding to make such decree as the High Court of Chancery ought to have pronounced: Decrees, that the said Court of Chancery, after having directed a commissioner to state the several claims of the parties, according to the principles of this decree, do direct specific sums to be paid to each claimant, and that the costs in the said court be first paid out of the general fund.

YERBY *againſt* YERBY.

If ſince the act of 1792, and before the act of 1794 concerning wills, a man having children, makes a will and deviſes his whole eſtate amongſt them. After which he marries a ſecond wife, by whom he has children, and dies without altering his will; the ſecond marriage and birth of children is no revocation of the will.

Quere: Whether the court of probat could decide whether the will was revoked or not.

Circumſtances may rebut an implied revocation of a will.

MARY YERBY and William Yerby children of George Yerby, filed a bill in the High Court of Chancery againſt the adminiſtrator and deviſees of the ſaid George Yerby, ſtating, that the ſaid George Yerby in May 1790, being a widower with ſix children, intermarried with Elizabeth Ruſt, by whom he had iſſue the plaintiffs.—That he had promiſed before his ſecond marriage, that his children by his laſt wife ſhould be as well provided for as thoſe by the firſt. That after the death of the ſecond wife he had ſaid that he had a will by him made in 1785, which he would alter as ſoon as he was ſufficiently recovered, as it provided for a dead child, and made no proviſion for the plaintiffs. That he died, however, without altering the ſaid will, which has been admitted to record in Richmond county court, and that judgment was affirmed by the Diſtrict Court. That the ſaid will diſpoſes of his whole eſtate; ſo that the plaintiffs are left without a ſhilling, if the ſaid will ſhould ſtand: But the plaintiffs are adviſed that the ſecond marriage and birth of the plaintiffs was a revocation thereof; eſpecially under the equity of the act of Aſſembly, which directs that a will made when the teſtator had no child & which does not provide for an after born, or poſthumous child, ſhall be void as againſt ſuch child, who ſhall be entitled to a diſtributive ſhare of the teſtators eſtate.* The bill therefore prays that the plaintiffs may be admitted to ſuch ſhare, and for general relief.

The anſwer does not admit any marriage agreement. The adminiſtrator who is the teſtators eldeſt ſon, ſays that he preſſed his father on his death bed to alter his will and provide for the plaintiffs; but it was never done.

There is an attempt to prove a marriage contract for the benefit of the iſſue by the laſt mar-

* *Acts of* 1782, *and* 1792.

Yerby, vs. Yerby.

riage, but the evidence is not sufficient to establish it. A witness, however, says, that he proposed to the testator in his last illness to alter his will, and provide for the plaintiffs; but he refused, saying, that he wished some alterations, and that when he got well he would have them made. That he appeared much distressed, and wished to evade the conversation.

The Court of Chancery dismissed the bill upon a hearing; and the plaintiffs appealed to this court.

WARDEN for the appellant. The will was revoked by the second marriage and birth of a child, *Pow. Dev.* 554. The first marriage and children will make no difference; because the father was equally bound to provide for the issue of the last, as for those of the first marriage; and the presumption is that he equally intended it.

WICKHAM *contra.* The Court of Chancery had no jurisdiction; for the judgments of the county and District Courts were conclusive: And if the plaintiff wished to have litigated the question raised by the bill, he ought to have done it in the law courts, and not resorted to a Court of Equity.—Of course the bill was rightly dismissed for the want of jurisdiction, even if the appellants were right upon the merits. But the decree is right upon the merits also; for there was no revocation. Hardship is out of the question. The act of Assembly only provides for posthumous children, and not for those born in the lifetime of the testator.—Revocation is not presumed for the benefit of the wife, who is provided for by law, but of the children. Of course it is but the common case of a man, who having children, makes a will, then has other children, and afterwards dies without altering his will: In which case the subsequent children are always disinherited. The act of Assembly goes further than the English law, which only comprehends the first clause of our act, and leaves implied revocati-

Yerby, vs. Yerby,

ons open: whereas the act of Assembly takes them up, and provides for such as the Legislature intended should annul the will; and therefore no other ought to have that effect. Besides it appears by the testimony, that the testator when upon his death bed, knew of the will, and did not alter it: which rebuts the ground of revocation altogether.

WARDEN in reply. The act of Assembly expressly gives the right of resorting to a Court of Equity to litigate the will, after it has been proved in the courts of law: which necessarily gives jurisdiction to the Chancery: Besides there is no plea to the jurisdiction; and of course it is now too late to except upon that ground. The testator declared upon his death bed that he would alter his will; which aids the implication. There is nothing in the act of Assembly which operates against an implied revocation like this; for it has said nothing about it, and therefore it stands as it did before the act.

Cur. adv. vult.

ROANE Judge. This is a bill brought by the second children of Mr G. Yerby against his administrator, praying that a will made by him in favour of his first children, prior to his last marriage, may be considered as revoked, or that they may be let into a share of his estate, under the equity of the third section of the act of Assembly, concerning wills &c. *Rev. Cod.* 168.

The will contains a disposition of his whole estate to his first children, and the present plaintiffs are wholly unprovided for.

It is alledged, but not shewn, that this will was made by Mr. Yerby, when a widower: But I do not know, that it is material whether he were so, or was then married to his first wife. Most of the cases on this head are of wills made during celibacy: But the case of *Christopher* vs *Christopher*,

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4 *Bur.* 2182, was of a will made in the lifetime of a former wife: She however died without iſſue, and the will was, I preſume, of courſe in favour of a ſtranger. In the event, however, of this teſtator having been a widower, when his will was made, it is evident that a greater change of his ſituation had intervened between the time of its date, and his death, than under a contrary ſuppoſition; and it is the alteration of ſituation only, which, in caſes like the preſent, gives ground to preſume a revocation. I cannot alſo, at preſent, ſee a reaſon for preſuming a revocation in favour of the children of an intervening mother, which does not equally hold in favour of thoſe of a contemporaneous one.

This caſe may be conſidered, 1. As on the general queſtion juſt ſtated. 2. As affected by the teſtimony in the cauſe.

On the general queſtion, I have found no deciſions in favour of a revocation, except where there was a diſpoſition of the whole property, and none except where the diſpoſition was to others than children of the teſtator. If the caſe ſtated by Lord Nottingham in *Wingfield* vs *Combs*, 2 *Ch. cas*, 16, be conſidered as being of a contrary kind, I reply that the principle of that caſe has been often ſince overruled, and that that caſe would not be ſubſcribed to at this day.

As to the firſt requiſite above mentioned, our will comes fully up to it; for here is a total diſpoſition. The ſecond requires ſome conſideration.

If a man ſtanding in a ſtate of celibacy, or being married has no children, bequeaths his eſtate to thoſe who have no natural or moral claim upon him, and afterwards contracts a new relation, which produces thoſe who have the ſtrongeſt of all human claims upon him for protection and aſſiſtance, in the abſence of all teſtimony relative to intenti-

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on, we muſt preſume, in honour of the human character, and in conformity to the juſt idea, that no man intends to rebel againſt the ſtrongeſt moral and natural duties, that the teſtator had forgotten the exiſtence of the inſtrument, or had ſuppoſed it nullified by the poſterior change in his ſituation. We muſt not readily admit a preſumption ſo outrageous againſt every thing juſt and proper; ſo militant againſt the feelings of human nature, as that a parent would, in favour of ſtrangers, diſinherit his whole offspring. By ſtrangers I here mean perſons other than children of the teſtator. Whatever good reaſons may exiſt with a parent for pretermitting particular children, it is an unreaſonable preſumption, that the whole of a mans progeny has incurred his wrath and diſpleaſure. But this extreme caſe is widely different from that before us. Six out of eight of the teſtators children are provided for: Strangers are not prefered to his own offspring: It is, at moſt, only a particular diſheriſon: And if theſe children had been the children of the ſame mother, this ſuit would not been brought. Yet it is not eaſy to diſcern that *their* claims on their father are leſs ſtrong than thoſe of the preſent plaintiffs.

But however this queſtion may be as a general one, the idea of revocation is rebutted in the preſent caſe.

So far from this inſtrument being conſidered by the teſtator as revoked, as being no will, it was conſidered by him as a ſubſiſting will; but one, indeed, which he intended afterwards to alter. Abner Dobyns proves this. A reference to a will as a ſubſiſting one rebuts the preſumption of revocation. *Brady* vs *Cubit*, *Dougl*: 31. And an expreſſion of intention to revoke a will *in futuro*, does not revoke the will, unleſs the alteration be made. *Pow. Dev.* 534. Much leſs will an intention to alter a will be preſumed to revoke it.

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It is alſo in oppiſition to the pruſumption of revocation, that the deviſor declared that his firſt children ſhould not be injured by his ſecond marriage, and that he intended the land he lived on, even after the birth of his laſt child, for the ſons of his firſt marriage: Both theſe intentions would be contravened by a deciſion in favour of revocaiion.

It was argued, by Mr. Wickham, that a court of equity had not, and that the court of probate only had, the power to decide on queſtions of implied revocations. He diſſers much from a reſpectable judge of the general court, who decided in the caſe of *Wilcox* vs *Rootes*, that a court of *probat* had nothing to with queſtions of the kind. That judgment was reverſed in this court; but there is nothing in the deciſion here. conveying an idea, that the power belonged to the courts of probat, in excluſion of other courts. Mr. Wickham's idea is alſo confronted by the 11th ſection of the act "concerning wills &c." authoriſing a procedure in Chancery, within ſeven years, to conteſt the validity of a will.

Mr. Wickham alſo ſuppoſed that the ground of implied revocations was narrowed down, ſo far as to ſhut out the preſent caſe, by the ſpecification of two caſes, of total and particular revocation, proved for by the 3d ſection of the ſame act. As this cauſe is in Mr. Wickham's favour upon the merits, I have not conſidered, nor ſhall I ſay farther than is inferable from this opinion, whether the gronnd of implied revocation taken by the act be narrower than that, which before exiſted. But if it be ſo, it ſeems to me at preſent, that if the ſtrong negative words of that clauſe interdicting revocations otherwiſe than purſuant to the act do not extend to implied revocations, neither can the particular affirmative declarations thereof going to caſes not coming up to the general doctrine, or only inſerted through abundant caution.

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But the plaintiffs say they come within the equity of the third clause concerning wills &c. That clause has two members. The first is, that if a testator having no child living shall make a will, not mentioning, or providing for children, which he might have, if at the time of his death, he leave a child, or his wife *ensient* of a child, which shall be born, such will shall have no effect during the life of such after born child, and shall be void unless the child die without having been married, or before attaining twenty one. This provision stands on the same ground with the general doctrine, authorizing implied revocations, which I have just stated: It makes some alterations indeed as to the effect of the will in relation to the after born childs marrying or coming of age; but it only contemplates a case of a disposition to strangers; for it only applies to cases of testators having no children living at the date of the will. It consequently only establishes a revocation, where there is a total disherison in favour of strangers, of all the testators progeny.

In these important respects our case differs from that, provided for by that member of the clause, and does not come within the reason upon which it is founded.

The latter member of the clause relates to posthumous pretermitted children, and gives them a provision, which it is presumed the father would have done, could he have forseen their future existence. The reason and equity of this provision does not extend to our case, where the plaintiffs were living in the testators lifetime.

Under these impressions I think the decree of dismission ought to be affirmed.

FLEMING Judge. The important question is, whether the second marriage and birth of children by it revoked the will of 1785? That marriage

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and the birth of a child are a revocation, was, at firſt, conſidered as applying to perſonal eſtate only; they were however, at length, ſettled to be equally applicable to real. 4 *Burr.* 2171, *Pow. Dev.* 555; but as a preſumptive revocation only, liable to be rebutted by expreſſions in the will, or by circumſtances. 1 *Lord Raym* 441, *Dougl.* 31: And, in the preſent caſe, there is abundant evidence that the teſtator, when about to marry the ſecond time, declared that it ſhould not prejudice his children by the former marriage; and, even after the birth of a ſon by the laſt wife, he was heard to ſay he did not intend him any land, but would give him an education, and bind him to ſea, or ſome uſeful trade. Theſe circumſtances repel the idea of a revocation even upon the principles of the Engliſh law: And, under the act of Aſſembly which requires actual deſtruction of the will, or a revocation in writing, the appellants can have no relief; for they come within neither of the exceptions: Not within that which declares that no will, made when the teſtator *had no child living*, ſhall be effectual during the life of an after born child; becauſe the teſtator had children living when his will was made: Nor within that relative to poſthumous children; becauſe the appellants were not ſuch. Of courſe there is nothing to ſave them from the general operation of the law. For although the teſtator is ſaid to have declared, in his laſt illneſs, an intention, if he recovered, to make alterations in his will, they were not expreſſed, or reduced to writing, and therefore can have no manner of effect. Conſequently there being nothing to impeach the will, the Chancellor did right in diſmiſſing the bill, and his decree ought to be affirmed.

CARRINGTON Judge. I recollect two caſes upon the ſubject of implied revocations: The firſt was the will of an old man who had never married, but who afterwards marrying and having children, the general court adjudged it a revoca-

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tion: The other was the will of Mr. Wilcox, who had no children at the time of making it, but afterwards married and had iſſue; which this court decided revoked the will, 1 *Wash.* 140. The preſent caſe, however, is like neither of them; for the teſtator here had children at the time of making his will; and therefore the appellants are not entitled upon the ground of thoſe deciſions. But even in caſes where the teſtator has no children at the time of making his will, the preſumption may be rebutted by circumſtances: And here the teſtator ſpoke of his will in his laſt illneſs, and declared an intention to make alterations, but manifeſted no deſire to revoke it: Added to which he had before ſaid that he did not mean to give the complainants any part of his eſtate, but to educate them, and bind the ſon to ſea, or to a trade. Theſe circumſtances deſtroy the preſumption; and, as the appellants do not come within the exceptions in the act of Aſſembly, I think the decree is right, and ought to be affirmed.

LYONS Judge. Concurred that the decree ſhould be affirmed.

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Deviſe of lands to T H, and his heirs; but if *T. H dies without a lawful heir*, remainder over to R. H. and his heirs, created an eſtate tail in T. H. and conſequently is barred by the

IN ejectment brought by Hill againſt Burrow, for a tract of land, the jury found a ſpecial verdict ſtating, That Richard Hill made his will on the 3 of Oct. 1774, whereby he deviſed, the lands in the declaration mentioned, as follows, "I give "and deviſe to my ſon Thomas Hill, all my lands "on the north ſide of Nottoway river, in Suſſex "county, to him his heirs and aſſigns forever, as "alſo my lands in Brunſwick county, to him and "his heirs forever; but *in caſe my ſon Thomas*

act of Aſſembly for docking entails,

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" *Hill, dies without a lawful heir*, my will and " desire is, that the tract of land, in Brunswick " county only, should descend to my son Richard " Hill & his heirs forever." That the testator died in the year 1775. That Thomas Hill entered on the lands; and, in February 1779, conveyed them to Wilburne. That the said Thomas Hill died in 1795, *without having been married, and leaving at the time of his death no lawfully begotten child, or children.* That the plaintiffs are the heirs of the said Richard Hill the younger, the devisee, in the said recited clause of the will, mentioned. That the defendant holds under the said William Wilburne. The District Court gave judgment for the defendant; and the plaintiffs appealed to this court.

G. K. TAYLOR for the appellant. The question is, whether the devise over, was good, and took effect, upon the death of the first devisee without issue? The words, *a lawful heir*, confine the contingency to the time of the death of the first devisee; which is a reasonable period, and within the rules concerning executory devises. The law has undergone a considerable change upon subjects of this kind. After the statute of *Hen.* 8, concerning wills, the judges, for the sake of alienation, usually inclined to construe the bequest to be an entail, instead of an executory devise; but, not having the same motive for it in personals, they soon established a different rule, with regard to them. *Fearne, new edit:* 182; and therefore in *Pinbury* vs *Elcan*,* *Atkinson* vs *Hutchinson*,* and various other cases, the slightest expressions, as the word *leaving &c.* were held sufficient to confine the devise to a period which the law would endure, notwithstanding the old doctrine that there could be no limitation over of a chattle, after a precedent gift of it for life. The same doctrine was recognized and supported in *Dunn* vs *Bray*, 1 *Call* 328. It is true that for a long time a distinction prevailed between cases where the words were applied to personal estate, and where they

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were applied to lands: In the firſt the limitation over would be ſupported, but not in the laſt. *Forth* vs *Chapman*,* & *Hughes* vs *Sayer*.* This diſtinction however is now exploded; and, at this day, the ſame conſtruction prevails, whether the words relate to lands, or perſonal eſtate. *Porter* vs *Bradley*, 3 *Term rep*, 143, *Roe* vs *Jeffrey*, 7 *Term rep* 589. Theſe caſes prove that the doctrine is clearly ſo in England: and there is the ſame reaſon for it in this country: Perhaps the reaſon is even ſtronger for it here than there; becauſe, there, the entail ſupports the deviſe, and effectuates the intent to a degree throughout, inaſmuch as the remainder will be good after the entail is ſpent, but here, if it be not taken as an executory deviſe, the remainder fails altogether. There is, in reaſon, no diſtinction between *dying without a lawful heir*, and *dying without* leaving *a lawful heir*: But the caſes juſt read ſhew, clearly, that, in the latter caſe, the limitation would be good; and therefore it is ſo in the former. The words in the preſent caſe are equivalent to *dying without a child*. For the limitation is to Richard Hill the brother; ſo that Thomas could never die without an heir, whilſt Richard or his deſcendants were living. This proves that *an heir* of the body, that is, *a child*, was clearly meant. Which brings it within the influence of *Higginbotham* vs *Rucher*, 2 *Call*, 313. The caſe is not ſtronger than that of *Brewer* vs *Opie*, 1 *Call*, 212; for there the words were *lawful heir*, only; which were more indefinite than the expreſſion made uſe of here; as that ſeems to tie it up to an individual who had come into exiſtence at the time of the death of the firſt deviſee. The ſame kind of expreſſion is uſed in the ſucceeding clauſe, relative to the deviſe of the ſlaves; in which all the caſes agree that the limitation over is clearly good; and therefore it is fair to infer that the teſtator meant the ſame thing, with regard to the deviſe of the lands.

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ROBERTSON *contra.* The deviſe, according to the exiſting law at the time of making the will, created an eſtate tail clearly. The authorities in ſupport of this poſition are numerous; but I ſhall content myſelf with refering the court to a few diſtinct examples. *Fearn, old edit*: 322, 350, 170, 1 *Wash.* 71. Theſe caſes appear to me to eſtabliſh the doctrine, uniformly, to be, that a limitation upon a general dying without an heir, which is the ſame as dying *without heirs*, creates an eſtate tail: And of courſe Thomas Hill the firſt deviſee, here, only took an eſtate tail: Which, by the operation of the act of 1776, for docking intails, was turned into a fee ſimple, and the remaider to Richard deſtroyed. *Carter* vs *Tyler*, 1 *Call*, 165. The caſes cited in oppoſition to this doctrine, do not impeach it. The paſſage quoted from 2 *Fearne*, 182, related to perſonal eſtate only, and conſequently does not apply: Beſides there were reſtrictive words in that caſe; which tied up the deviſe to a reaſonable period. In *Porter* vs *Bradly*, 3 *Term rep.* 143, the word *leaving*, had the ſame effect. *Roe* vs *Jeffry*, 7 *Term rep.* 589, differs eſſentially, from this, in many circumſtances; particularly the word *leave* was deciſive. The caſes of *Higginbotham* vs *Rucker*, 2 *Call*, and *Brewer* vs *Opie*, 1 *Call*, are not like that before the court; and therefore afford no argument in favour of the appellant. It is not true that the ſame words appplied to real and perſonal property will receive the ſame conſtruction; for the contrary has been expreſſly held. *Forth* vs *Chapman*. *Wms.* 667. The judgment is therefore right; and ought to be affirmed.

HAY in reply. Caſes upon wills are not material, unleſs preciſely ſimilar. 1 *Wash.* 103: And in the preſent caſe, I may fairly ſay, in the language of Judge Buller, 1 *Term rep.* 596, "nothing can raiſe a doubt, about the conſtruction, except overwhelming it with a multitude of caſes." I ſhall therefore conſider the caſe upon principle, only: And my firſt propoſition is, that the inten-

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tion of the teſtator is alone to be conſulted, and will be carried into effect, unleſs he wiſhes to create an eſtate, or to annex a condition, which cannot legally exiſt. 1 *Wash.* 102, 2 *Black. com.* 381 1 *Term rep.* 597. Here the intention is clear, even beyond controverſy; for it is not controverted. The teſtator intended to make a proviſion for Thomas and his family, but if he had no child then to give his eſtate to Richard. 1 *Wms.* 565; where the expreſſion is not ſtronger, than in the caſe before the court. This intention of the teſtator may be carried into effect, without violating any principle of public policy, or creating an eſtate forbidden by law. And therefore it ought to be done. The ſecond propoſition which I aſſume is, that where words in a deed or will are ſuſceptible of two conſtructions, that ſhall be preferred, which tends, to make it good. 3 *Wms.* 360. Admit then, that the words "if my ſon Thomas dies without a lawful heir" are ſuſceptible of two conſtructions, one an immediate, the other a future failure of iſſue, the firſt ought to be preferred; becauſe, under that conſtruction the intention of the teſtator, as to both the deviſees, is fulfilled. For Thomas would have a fee ſimple, and, if he died without an heir, Richard would take the property. Whereas, if the ſecond conſtruction be adopted, Thomas will have an eſtate tail, which the teſtator never meant to create. But the words do not admit of two conſtructions: For the words, "if Thomas dies without a lawful heir," mean if he has no child living at his death. 1 *Wms.* 565. The third propoſition which I ſhall contend for is, that real and perſonal property, as to limitations of this kind, ſtand upon the ſame footing; and that words of limatation, applied to real property, will have the ſame conſtruction, as if applied to perſonal eſtate. The caſe of *Forth* vs *Chapman*, is objected; but the doctrine, there laid down is contrary to common ſenſe, 3 *Term rep.* 146, 3 *Bro. c. cby.* 82.

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The progreſs of the Judiciary, upon ſubjects of this kind, is worthy of notice. Originally there could be no limatation over of a chattle, 2 *Black.* 397: After this a diſtinction was taken between the deviſe of the uſe, and a deviſe of the thing itſelf. This, however, was afterwards exploded. But ſtill, if words of inheritance were applied to the firſt deviſe, the abſolute property vetted in the firſt deviſee. This at length alſo began to give way; and, if the limatation was to take effect within a life or lives in being and twenty one years afterwards, it was held to be good. Finally, it was ſettled, that, as to chattles, the court would catch at any circumſtance to ſupport the limitation over, 2 *Fearne* 239, 1 *Call* 338; and why not in the caſe of land? A diſtinction is impoſſible. The words are now taken according to common parlance; 1 *Wms.* 199, 565 and 1 *Term rep.* 593, 596, 3 *Wms.* 260, 2 *Term rep.* 720, 3 *Term rep.* 142, are deciſive of the liberality of the law, at the preſent day.

Robertson. All the caſes prove that a limitation, after an indefinite dying without heirs, is void, as an executory deviſe; and that there muſt be ſome circumſtances to tie up the limitation to a reaſonable period of time, otherwiſe the firſt eſtate will be either conſtrued an entail, or the limitation over will fail, on account of the remoteneſs of it. The caſes cited on the other ſide do not diſprove this propoſition.—1. *Wms.* 565 was the caſe of perſonal property; and therefore has no application. 3. *Term rep.* 146, inſtead of oppoſing, admits the principle contended for by me. 7 *Term rep.* 589, had the words *leave no iſſue*, which tied it up; and that was corroborated by the direction that it ſhould *be and return to the* ſurvivor, or ſurvivors. 3 *Bro.* 82 was influenced by the words to *divide &c.* which confined it to a definitive period. The caſes in 2 *Fearne*, 239, and that of *Dunn* vs *Bray*, 1 *Call*, related to perſonal eſtate; beſides, in the latter, , the word *leave* tied up the limitation. It is not material that the word *heir* is uſed

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inſtead of *heirs*; for their is no diſtinction between them, *King* vs. *Burchell*, *Fearne*, 124. To this I add that the doctrine contended for leads to the eſtabliſhment of perpetuities; and therefore ought to be rejected.

Cur. adv. vult.

ROANE Judge. This is an action of ejectment, and the queſtion depend upon the conſtruction of the will of Richard Hill (dated 3d October, 1774,) who died in the year 1775.

The clauſe on which the queſtion turns is to the following effect, "I give to my ſon T. Hill, all "my lands on he north ſide of Nottoway river, "in Suſſex, to him and his heirs and aſſignes for- "ever, as alſo my lands in Brunſwick to him and "his heirs forever; but, in caſe he dies without "a lawful heir, my will is, my lands in Brunſwick "only, "*the premises in question*" "ſhould de- "ſcend to my ſon Richard Hill, and his heirs for- "ever, as alſo the following ſlaves &c.

Similar diſpoſitions are alſo made to his two ſons Green Hill and Richard Hill, with preciſely the ſame limitations over to Thomas Hill and his heirs forever, in both caſes. I infer, from this latter circumſtance, that Thomas Hill and his family were rather favorites of the teſtator.

Another diſpoſition is made to his daughter Rebecca, of ſlaves &c. and if ſhe died without a lawful heir, or under twenty one, her ſlaves &c. to be equally divided among the remaining children.

Thomas Hill having died in 1795, without having been married, or leaving lawful iſſue at the time of his death, the queſtion ariſes under the clauſe juſt ſtated, what eſtate the ſaid Thomas Hill took in the premiſes,

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The counsel for the appellants, finding their cause desperate in any other view of the subject, relied strongly upon a supposed decision of lord Kenyon, shaking the authority of *Forth* vs *Chapman*. That they could have found any grounds for such an attempt, I confess, surprized me. Not fully acquainted with the merits and character of that judge, I yet thought it strange, that he who has been profuse in his admiration of Lord Holt; who has diverged from the liberal decisions of Lord Mansfield; who has declared, in appropriate and emphatical terms, the duty of a judge to be *dicere et non dare jus*, should be prompt at innovation upon the settled rules of property.

But in fact the case relied on by the gentlemen does not bear them out: The determination, therein imputed to that judge, is afterwards disavowed by him, as a judicial opinion, in *Roe* vs *Jeffery*, 7 *Term rep.* 595; and the distinction taken in *Forth* vs *Chapman*, is admitted, and acted upon by him in a subsequent case of *Daintry* vs *Daintry*.

This supposed, and single, deviation from that case being thus removed, it is unnecessary for me to quote instances from the books wherein its authority has been often and solemly recognized.

In *Forth* vs *Chapman*, it was decided, that, if freehold and leasehold lands be devised to A, and if he die leaving no issue of his body, *then* to the daughter of his brother, and children of his sister, this devise should be expounded to imply an indefinite failure of issue as to the freehold lands, and be restricted to issue, living at the death, as to the leasehold, and the words be considered as if they had been repeated by two several clauses.

The object of the gentlemen was to explode the distinction, as relative to freehold lands.

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The reaſon of this diſtinction is, that the words are ſo underſtood in relation to real eſtate, in order to create an eſtate tail in favour of the iſſue, who are capable of taking an inheritance, but with reſpect to a term that conſtruction cannot benefit them; for a term cannot deſcend to them, 2 *Fearne* 231: Notwithſtanding however this diverſity, from whence may be inferred a general difference of intention, as relative to the two ſubjects, yet it has never been held that a reſtrictive conſtruction ſhall take place, even in relation to chattles, unleſs there be a particular intention inferable from the will favouring ſuch conſtruction. Slight circumſtances, indeed, have been laid hold of to produce this effect, ſuch as the words "*leaving*," "*then*," "a limitation to a perſon *in esse* for life &c." but yet there muſt be ſome ſuch.

I lay it down, then, as an incontrovertible poſition, that words importing a limitation in tail are taken in their *legal ſenſe*, as to real eſtate, under circumſtances in which they would be taken in their vulgar ſenſe as applying to chattles; and that when they are taken in the latter ſenſe as applying to the latter ſubject, it is not from the general intention of the teſtator inferable from the diverſity juſt ſtated, but from a particular intention appearing in the will itſelf, coming in aid of the former.

Bearing in mind this diſtinction, and the ground of it, let us examine the preſent caſe.

If the ſubject of the deviſe in queſtion had even been perſonal eſtate, I ſee no grounds whereon we could reſtrict the limitation to mean iſſue living at the death. The words of the deviſe are appropriate, and emphatical, to import an eſtate tail, and there is an abſence of all words, ſuch as *leave*, *then*, *&c.* which have frequently been reſorted to, for the purpoſe of infering a particular intention.

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Great ſtreſs is, however, laid upon the expreſſion *If he die without a lawful heir*, as indicative of an intention to reſtrict: But there is nothing in it. Thoſe words ſtanding ſingly are fully competent to convey an eſtate in fee, or tail, with reference, as the caſe may be, to the perſon in remainder; that is, whether he can be a collateral heir, or not.

The word *Heirs* or *Heir* is *nomen collectivum*. No caſe is recollected, where the diſtinction now ſet up was taken. The caſe of *Goodtitle* vs. *Pegden*, 2. *Term rep.* 720, was as to this point, ſubſtantially like that before us. "Lawful heir" was there conſtrued to mean, *Iſſue of his body*; and it is believed that, if *iſſue* were ſubſtituted in this will, the objection would not have been made. In that caſe, it is true, the words were conſidered as reſtricted, and the limitation over good: But the word *leaving* was alſo there, and the court in their opinion laid no ſtreſs upon the word *heir* being in the ſingular number.

If it be ſaid that the expreſſion in our caſe is tantamount to the words *not leaving*: I anſwer that it is equipollent, at moſt, to the expreſſion *not having*: which is conſidered by lord Kenyon in *Weakly* vs *Rugg*, 7 *Term rep.* 326, as eſſentially different from *not leaving*.

It is obſervable alſo, that in the deviſe of ſlaves to Rebecca, the teſtator not only omits the words *to her and her heirs for ever*, but adds the contingency of her dying under 21, a circumſtance denoting reſtriction, and limits the remainder to be equally divided among the remaining children: Thereby, perhaps, throwing the caſe of this bequeſt within the reaſon on which the caſes of *Hughes* vs. *Sayer*;—*Nichols* vs. *Skinnner*;—*Higginbotham* vs. *Rucker*, and others are decided.

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But the ſubject of the preſent deviſe is not perſonal eſtate, but land. As to this ſubject the general intention is in favor of an eſtate tail. The words uſed are entirely adequate to that purpoſe; and there are no grounds whereon to infer a particular contrary intention, but the converſe. Such as the different phraſealogy uſed in the bequeſt to his daughter Rebecca, and the circumſtances before ſtated, ſhewing Thomas Hill and his family to have been favorites of the teſtator. I am therefore of opinion that the judgment ought to be affirmed.

FLEMING Judge. The firſt part of the deviſe to Tho's Hill and his heirs was turned into an eſtate tail by the ſubſequent words *in case my said son Tho's Hill dies without a lawful heir*; for the latter words plainly mean an heir of his body, as he could not die without an heir whilſt his brother Richard was living. But it is ſaid that the words *dies without a lawful heir* meant if he died without *leaving* iſſue at the time of his death. There is however a diſtinction in this reſpect between lands and perſonal eſtate: In the latter the words are taken in the vulgar ſenſe, but in the former the legal ſenſe prevails; that is to ſay, they are conſtrued to mean a failure of iſſue generally.—*Cowp.* 410. It is true that Lord Kenyon in *Porter* vs *Bradley*, 1 *T. rep.* 143, appears to have heſitated at the diſtinction; but the doctrine is too fully eſtabliſhed to be overturned by a ſingle deciſion. The rule is inflexible that a limitation after a dying without iſſue generally creates an eſtate tail, unleſs it be controuled by reſtrictive words clearly manifeſting an intention to confine it to a dying without iſſue living at the death of the deviſee, or ſome other reaſonable period: And, as there are no ſuch words in the preſent caſe, I am of opinion that the legal ſenſe muſt be adhered to, and that Thomas took an eſtate tail; which was turned into a fee ſimple by the act of 1776 for docking entails. The reſult is, that the judgment of the Diſtrict Court is right, and ought to be affirmed.

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CARRINGTON Judge. The judges who preceded me have exhauſted the ſubject; and therefore I have only to add that I concur in the opinion that Thomas Hill took an eſtate tail; which, by the act of 1776; was turned into a feeſimple: Of courſe the judgment of the District Court is right; and ought to be affirmed.

LYONS Judge. I have always thought the diſtinction between lands and perſonal eſtate to have been ſettled by the caſe of *Forth* vs *Chapman*; and that it was certain that a limitation over of lands after a general dying without iſſue, created an eſtate tail. *Fearne* 363. It is to no purpoſe to be arguing about the intention, unleſs the words will authoriſe a reſtricted conſtruction; for mere intention cannot prevail againſt a ſettled rule of interpretation, which has fixed an appropriate ſenſe to particular words; becauſe, when the ſenſe is once impoſed, they become the *indicia* of the teſtators mind, until the contrary is ſhewn by countervailing expreſſions. *Harg. L. Tracts* 508. It is better that it ſhould be ſo too: For the law ought to be certain; and when the rule is once laid down it ſhould be adhered to: Otherwiſe what is called liberality, at the bar, will degenerate into arbitrary diſcretion, and all muſt depend upon the will of the judge. None of the caſes cited by the counſel for the appellant contravene the ſettled doctrine. That of *Porter* vs *Bradley*, which was moſt relied on, evidently does not, for the words *leaving* iſſue, there, eſſentially varies it from this case: And all the other deciſions, both before and ſince, have ſo firmly eſtabliſhed the conſtruction in favour of the intail, that it has now become a a canon of property, which it would be dangerous for the court to alter. The Legiſlature, by the act for docking intails, plainly underſtood it in this manner; and therefore they left the conſtruction as it was before, but turned the entail, when created, into a feeſimple. An infringment of the rule, then, inſtead of ſupport-

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ing the Legiſlative intention would go directly to defeat it; and would tend, under the notion of executory deviſes, to introduce that very clog to alienation which the ſtatute meant to aboliſh. Conſequently, finding nothing in this caſe to take it out of the general rule, I think that Thomas Hill took an eſtate tail, which, by virtue of the act of 1776, was turned into a feeſimple; and therefore that the judgment of the Diſtrict Court is right.

Judgment affirmed.

TATE,

againſt

TALLY.

Deviſe of lands to A. and *if the ſaid A. ſhould die not having any lawful heir of his body*, then the land to go to B, this is an eſtate tail in A.

IN ejectment brought by John Tate againſt Debdul Tally for a tract of land in Hanover county, the parties agreed a caſe, which ſtated, That Robert Tate being ſeized of the lands in the declaration mentioned, made his laſt will on the 11th of May in the year 1777, whereby he devised the ſaid lands in the words following, "I will and be-"queath to my ſon Jeſſe Tate, all the land I hold "on the ſouth and eaſt ſide of the above mention-"ed road, bounded on the ſouth ſide by John "Tate and James Martin, on the weſt by Fran-"cis Tate, on the north and laſt by Richard Rich-"ardſon, containing about 205 acres more or leſs. "*Now if the ſaid Jeſſe Tate ſhould die, not hav-*"*ing any lawful heir of his body, then the ſaid* "*land to go to my youngeſt ſon John Tate.*" That, after the death of the teſtator, the ſaid Jeſſe Tate entered and was ſeized, and being ſo ſeized conveyed to a perſon, under whom the defendant claims. That the ſaid Jeſſe Tate died about the year——— *having never had any lawful iſſue.* That the plaintiff is the ſon of the teſ-

tator, and the perſon deſcribed in the ſaid deviſe by the words *my youngest son John Tate.* The Diſtrict Court gave judgment for the defendant; and the plaintiff appealed to this court.

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WICKHAM for the appellant. The queſtion is, whether the deviſe over to John Tate be good? In one point the caſe is nearly the ſame with that of *Hill* vs *Burrow* the other day; which was fully argued, and the caſes then cited, particularly *Forster* vs. *Bradley*, 3 *Term rep.* 143, clearly ſhew how the point would now be decided in England. Relying therefore upon thoſe caſes, and the arguments made uſe of upon them, I paſs to a ſecond point which occurs in the preſent caſe: Namely that the deviſe here was ſince the act of 1776 for docking entails: And therefore I contend whatever may be the Engliſh rule in ſuch caſes, that the limitation over, in the caſe before the court, is clearly good. For the act of 1776 has changed the whole ſyſtem, and ſubverted all the ancient reaſoning on the ſubject. In England eſtates tail are implied for the benefit of the iſſue, and to prevent their being defeated by the limitation over. But that reaſon does not hold with us at this day; for as eſtates tail cannot now be created, real and perſonal eſtate ſtand upon the ſame footing in reſpect to limitations over, after preceding eſtates are given. But the conſtant rule with reſpect to limitations of perſonals is, to purſue the particular intention of the teſtator as expreſſed in the will, and not to adopt the notion of the general intent as was done with regard to deviſes of land. This diſtinction is very well illuſtrated in *Fonbl. Tr. Eq.* And the reaſon is obvious, namely, that it would counteract inſtead of ſupporting the general intent of the teſtator in the caſe of perſonal eſtate; becauſe that could not be entailed, but the firſt deviſe would give the whole property; ſo that the limitation over, which in that caſe would be within the general intent of the teſtator, would be entirely defeated, *Dunn* vs. *Bray*, 1 *Call*, 343, where the

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President, in delivering the resolution of the court expressly states it so. This reasoning applies emphatically to real estate since the act of 1776; because, as the first devise will now give the whole estate in lands also, the object of the testator will be defeated, by the implication: And therefore in support of the intention the implication will be rejected. Consequently the court will now pursue the course with regard to devises of personals, in which the Judges have been astute in finding out distinctions in order to maintain the limitation over.—2 *Term. rep.* 721; where the words are scarcely so strong as in our case; and yet the limitation over was supported. Let us suppose that the Legislature instead of docking entails, had declared that personal estate might also be entailed, then devises of personal estate would have been subject to all the rules with regard to entails of lands: And the converse of this doctrine ought now to prevail with respect to real estate since the act for docking entails was made. Before the act of 1776, as entails were lawful, there was a fair presumption that the testator intended an entail; but it is otherwise now; because that would be to presume he intended to create an estate contrary to law; which the court will not do: Especially as the effect would be to presume it, for the sake of destroying the intention of the testator, instead of supporting it. The act of 1776 leaves the construction with regard to express estates tail to remain upon the same foundation as before, but it is not correct to say that the same rule should apply to implied estates tail, for there is no reason for making the implication now. The rule has been found so inconvenient even in England; that the Judges there, have struggled to get rid of it; and therefore have been constantly narrowing, but never have enlarged it.

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RANDOLPH *contra.* The deviſe in this caſe would have created an eſtate tail before 1776 clearly; and therefore it gives a fee ſince. The teſtator did not intend an executory deviſe, but a remainder. For the firſt deviſe is to Jeſſe Tate for life, without any words of perpetuity, 5 *Term rep.* 13,—6. *Term rep.* 612. Therefore it muſt be conſtrued an entail in Jeſſe, or his iſſue would have been defeated; and this in favour of the eldeſt ſon, who was already provided for. The word *heir* is equivalent to *heirs*, 1 *Fearne* 181; and conſequently it is the ſame as if the deviſe had been to Jeſſe Tate for life, and if he dies without having any lawful heirs of his body, that is, *without iſſue*, then to John Tate in fee: which would have given an entail, clearly. 1 *Term rep.* 146.—5 *Term rep.* 555; which indeed is proved by Mr. Wickham's own caſe of *Dunn* vs. *Bray*, 1 *Call*, 343. This doctrine is right on principle, and is agreeable to the rule in *Shellys* caſe; for a man may be ſaid to die without iſſue, whenever his iſſue fails. *Lee's* caſe cited in *Forth* vs *Chapman*, 1 *Wms.* 664. It it not correct to ſay that the deciſions of the courts are to change with circumſtances; for when they have been of long ſtanding, they become rules of property, and ought to be conſidered as binding. 1 *Wash.* 202. There always has been a ſettled diſtinction in the conſtruction when the words relate to real, or to perſonal property. In the firſt they create an entail, in the latter a good executory deviſe. *Cowp.* 411. *Forth* vs. *Chapman* 1. *Wms.* 667, 5 *Term rep.* 338. And altho the opinion of Lord Kenyon in *Porter* vs. *Bradley*, 3. *Term rep.* 146 is cited to ſhew that he was againſt any differences between them, and reprobated the diſtinction taken by Lord Macclesfield in *Forth* vs. *Chapman*, yet it appears that he afterwards approved of it in the caſe of *Daintry* vs *Daintry*, 6. *Term rep.* 314. And indeed it was expreſſly recogniſed by this court in *Dunn* vs *Bray*. 1 *Call.* There is no ground for a difference in the conſtruction before and after the act of 1776. For that act was

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merely designed to turn the estate tail into a fee, but, to leave the construction, as to what words would create an estate tail, as it was before. *Carter* vs. *Tyler*, 1. *Call*, 186. In which Mr. Washington, who scarcely ever used a weak argument, expressly urged that there was no difference; and the court appears to have thought so. Indeed the bias of the court has been not to disturb old rules of interpretation, but on the contrary to maintain them. *Minnis* vs. *Aylett*, 1. *Wash.* 302. If the statute *de donis* was repealed in England this would be considered a conditional fee at common law there. It is said that the English Judges have been striving to get rid of the rule, but that rather proves it cannot be departed from. Nor is it unimportant, that the Legislature by the act of 1792, *Rev. code* 16. plainly shew their idea to be that the usual construction is to take place relative to estates tail; for they say, that every estate in lands, "which since hath been limited, or hereafter shall be limited, so as that the law aforetime was, such an estate would have been an estate tail," shall now be deemed an estate in feesimple.

WICKHAM in reply. The word estate may be taken from other parts of the will, and annexed to the devise to Jesse Tate, so as to create a fee instead of a life estate, *Davies* vs *Miller*, 1 *Call*, 127. The case of *Dunn* vs *Bray* does not prove that a distinction between real and personal estate should not be made, but the contrary. For it shews that it was formerly made for the sake of the issue only. The act of 1792 means limitations in tail expressly, and not by implication. Besides it was subsequent to this will; and therefore proves nothing. The case of *Carter* vs *Tyler*, was not a case of construction, but merely as to the effect of the act upon an acknowledged entail.

Cur adv. vult.

ROANE Judge. This is an action of ejectment for a tract of land, and the question depends on

the conſtruction of the will of Robert Tate of the 11th of May 1777.

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The particular clauſe of that will which gives riſe to it is in the following words, "I will and be- "queath to my ſon Jeſſe Tate all the land I hold "&c. *(the premises in question;)* now if the ſaid "Jeſſe Tate ſhould die, *not having any lawful "heir of his body*, then the ſaid land to go to my "youngeſt ſon John Tate." And the queſtion is, what eſtate the deviſee, Jeſſe Tate, took in the premiſes in queſtion.

The doctrines of the law are common to this caſe, and to the caſe of *Hill* vs *Burrow*, juſt decided, except ſo far as a diſtinction may ariſe from the different phraſeology of, and circumſtances appearing in the wills, and from the conſideration which was much preſſed upon us, that the will before us was made poſterior to the act of 1776 docking entails.

This being the caſe, I ſhall, to ſave time, refer to my opinion juſt delivered in that caſe; and eſpcially to ſuch parts of it as go to fortify the caſe of *Forth* vs *Chapman*, and to ſhew that even in the caſe of chattles, it is not the general intention ſolely which authoriſes a reſtrictive conſtruction relative to that ſubject, but a particular intention inferable from the will and caſe itſelf, coming in aid of the ſuppoſed general intention. Mr. Wickhams great argument was, that ſince the act 1776, prohibiting entails, there is the ſame general intention as relative to both kinds of property, and that real property, ſince that time, ſtands on a common ground with perſonal. If this were ſo, it ſtill is not enough, unleſs he ſhews alſo, that under this will, in the caſe of perſonal property, a reſtrictive conſtruction would have been adopted.

This I apprehend would not have been the caſe; but I ſhall not waſte time to enquire whether it

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would, or would not, thinking it beſt for the public good to go at once into the great queſtion; and being equally clear upon that queſtion, that it is quite immaterial, whether the will was prior to the act of 1776, or ſince.

The Legiſlative conſtruction of the act of 1792, accords with my own opinion on the ſame ſubject. It is intitled to reſpect, but would not bind this court to adopt the ſame conſtruction, contrary to their own judgment in relation to prior caſes.

The act of 1776 declares, "that any perſon who "now hath or *hereafter may have* any eſtate in fee "tail general or ſpecial in any land &c. in poſſeſ- "ſion &c. or who now is, or *hereafter may be* en- "titled to any ſuch eſtate tail, in reverſion or re- "mainder &c. whether ſuch eſtate tail hath been, "or ſhall be, created by deed, will, act of Aſſem- "bly or by any other ways or means, ſhall from "henceforth, or from the commencement of ſuch "eſtate tail, ſtand ſeized &c. to ſuch lands &c. "ſo held or to be held &c. in full and abſolute fee "ſimple, in like manner as if ſuch deed, will &c, "had conveyed the ſame to him in feeſimple: Any "words, limitations or conditions in the ſaid deed, "will &c. to the contrary notwithſtanding."

There can be but one poſſible conſtruction of this act, and that is, that it converts eſtates tail into feeſimple, but refers to and reſerves all laws then in force, for the deciſion of the queſtion, whether in future as well as in paſt caſes, an eſtate tail would (but for the interpoſition of the act) have paſſed or not? If ſuch reference is not made to the laws, what could the Legiſlature mean, after annihilating eſtates tail by pointing the act alſo againſt eſtates tail which perſons might hereafter have, and which they might hereafter be entitled to? Why elſe direct it againſt eſtates tail which ſhall be created by deed, will &c? why elſe refer to the commencement of a future eſtate tail?

why elſe uſe the expreſſion relative thereto, to be held &c?

Tate, &c. Tally.

Upon any other conſtruction, the act is a complete *felo de se*, as to future caſes, in reſpect of all thoſe emphatical expreſſions. It is no novelty, even for courts to refer to the *lex temporis*, for the conſtruction of inſtruments and contracts. The Legiſlature has gone upon the ſame principle in the preſent inſtance; but when the reſerved law has had its operation in relation to the conſtruction of eſtates tail, the act of 1776 ſteps in, and enlarges the intereſt into a feeſimple.

The preſent attempt of the appellant is to take from the tenant and his heirs, by conſtruction and analogy, that intereſt which it is the particular object of this act to ſecure to them, and which it is provided that no expreſs limitation by the party in the deed or will itſelf ſhall affect or fruſtrate.

I am therefore for affirming the judgment.

FLEMING Judge. There can be no doubt, as well upon general principles as upon the authority of the caſe of *Hill* vs *Burrow*, juſt decided, that the words of this will would have created an eſtate tail in Jeſſe Tate prior to the act of 1776. The queſtion therefore is, whether its being made ſubſequent to that act, has altered the caſe? And I think not: For the whole effect of that ſtatute is to convert eſtates tail into eſtates in feeſimple; and not to alter the meaning of words, or deſtroy the eſtabliſhed rules of conſtruction. My opinion, conſequently, is, that the judgment of the Diſtrict Court ought to be affirmed.

LYONS Judge. The caſe is not ſo ſtrong as even that of *Hill* vs *Burrow*: For here the firſt deviſee would have had only an eſtate for life, unleſs he had taken an eſtate tail. The judgment is right; and is to be affirmed.

DUVAL,
against
BIBB.

In ejectment a man cannot object his own poſſeſſion for twenty years againſt his own deed given within that period.

If in ejectment the demiſe and ouſter be laid precedent to the plaintiffs title, it is cured by the act of Jeofails.

If the bargainor continue in poſſeſſion after the conveyance, that poſſeſſion will not render a conveyance by the bargain void.

IN ejectment brought by Duval and Younghuſband againſt Bibb, for a tract of land, the jury found a verdict for the plaintiffs ſubject to the opinion of the court on a caſe which ſtated, That Bibb, by deed dated the 13th of December 1788, and recorded on the 16th of the ſame month, conveyed the lands to Graves. That Bibb was, at that time, in actual poſſeſſion, and had been ſo for upwards of twenty years. That Graves, on the 28th of November 1793, conveyed to Duval and Younghuſband. That there was no proof "that Graves "was ever in actual poſſeſſion, or ever entered up"on the premiſes, for the purpoſe of executing "the laſt mentioned deed; but that the defendant "now, and always hath, had adverſe poſſeſſion of "the premiſes againſt the ſaid Graves, and all "holding by or under him, except as to the opera"tion of the deeds aforeſaid."

The Diſtrict Court gave judgment for the defendant; becauſe "*the demiſe and ouſter laid in the plaintiffs declaration is precedent to the accruing of his title.*" To which judgment the plaintiffs obtained a writ of *ſupersedeas* from a judge of this court.

CALL for the appellant. The objection made by the Diſtrict Court is expreſsly cured by the act of Jeoffails.

RANDOLPH *contra.* If the Diſtrict Court erred upon the ground they mention which is not admitted, ſtill if they were right on any ground it will be ſufficient; and it does not appear that the plaintiff ever was in poſſeſſion within twenty years next before the ſuit. On the contrary, Bibb was

in adverſary poſſeſſion, and the deed was no interruption of it.

Duval. *vs.* Bibb.

PENDLETON Preſident. Did not the whole intereſt paſs by the deed from Bibb to Graves? I thought you had intended to argue the point, whether Graves, being out of poſſeſſion, could convey to Duval.

RANDOLPH. If the court are againſt me on the other points, I hope I ſhall be permitted to argue that.

Cur. adv. vult.

PENDLETON Preſident. The right of entry of Graves, under whom the plaintiff claims, accrued on the conveyance in 1788. If that conveyance had been from a third perſon Bibb's poſſeſſion would have been a bar to the entry; but ſurely he cannot avail himſelf of it againſt his own deed. On that point the court have no doubt.

The objection on which the Diſtrict Court founded its judgment, if any thing in it, is cured expreſſly by our ſtatute of Jeoffails.

Bibb being in poſſeſſion when he conveyed to Graves there can be no doubt of the legal operation of that deed.

But Graves being out of poſſeſſion, and that ſtated to be adverſe in Bibb, when the bargain and ſale to the plaintiff was made by Graves, the counſel are permitted, as they deſired, to argue the the queſtion, whether any title paſſed to the plaintiff by that deed.

CALL for the appellant. That queſtion depends upon the common doctrine relative to choſes in action, which has of late years undergone very great alterations, 4 *Term rep.* 340. It was for-

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merly held that a mere possibility was not assignable; but that doctrine is now completely reversed 1 *H. Black.* 30; and if such a contingent and uncertain estate as that could be granted, it would seem much more reasonable in such a case as the present: Otherwise innumerable inconveniences would follow; for then a man in debt, but out of possession, could not dispose of his lands to relieve himself from difficulties; and trustees could not sell under a deed of trust unless the debtor would consent to give them possession. Reason and public convenience are therefore strongly in favour of the conveyance, unless the act of Assembly, against buying and selling pretensed titles, shall be thought to make a difference. But it would be extraordinary, if a man were to be received to say, against his own deed, that his own vendee obtained a pretensed title, only; and it is scarcely credible, that the Legislature could have intended that a purchase under a deed of record, which is *prima facie* evidence of a complete title, should be rendered void by the possession of the vendor.

RANDOLPH *contra.* The verdict finds that Graves never was in possession; and, at common law, there must have been a junction of both right and seisin, in order to enable the latter to convey, 2 *Black. com.* 314, 290, *Co. Litt.* 214 266. The same rule holds with regard to conveyances under the statute: Which unites the use with the possession; but that necessarily supposes the bargainor to be in possession; or else the statute could not transfer his possession to the use. A seizen in law is not enough; for that is not sufficient for any purpose but a descent. 1 *Inst.* 49. *Plowd* 139. Besides the contrary doctrine is expressly against the act concerning buying and selling pretensed titles; and a conveyance against a rule of law, or statute, cannot be supported. *Carth.* 252.

WICKHAM for the appellant. The tenant of the freehold may convey; and the act of Assembly, *Rev. code* 167 made Graves tenant of the freehold, immediaately, on the execution of the deed to him. But a man once seized continues seized, until he is actually disseized *Taylor* vs *Atkyns*, 1 *Burr* 110. 1 *Salk.* 245. *Cro car.* 302. *Cro Jac.* 662, which likewise shews that the owner may elect to consider himself disseised, or not, at his pleasure. The jury have not found an adverse possession positively, but conditionally; and therefore, according to the doctrine, Graves had a right to consider himself disseised, or not, as he pleased: and consequently had a right to convey.

Cur. adv. vult.

PENDLETON President delivered the resolution of the court as follows This is a supersedeas to a judgment of the District Court of Charlottesville in ejectment commenced there by the appellants against the appellees; in which the jury find a special verdict, stating that the defendant Robert Bibb, by deed of bargain and sale dated Dec. 13, 1788, which was duly recorded, conveyed the lands in question to Francis Graves in fee, and covenants to warrant and defend the land to Graves, his heirs and assigns against himself and all others. That Graves, by a like deed dated Nov. 28 1793, also duly recorded, conveyed the lands to the plaintiffs in fee, with a general warranty: That at the time of the first conveyance, the defendant Robert was in possession, and had been for upwards of twenty years. That no proof was made that Graves was ever in actual possession, or ever entered into the land for the purpose of executing his deed to the plaintiffs, but that the defendant Robert has now, and always has had, adverse possession of it, against Graves, and all holding under him, except as to the operation of the deeds. On this verdict judgment was given for the defendants; because, as the record states, the demise and

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ouſter, as laid in the declaration, appear to be prior to the commencement of the plaintiffs title.

The firſt queſtion ariſes on the reaſon given by the court for their judgment; but this is plainly decided by a clauſe in the act of Aſſembly of 1792 page 119 of the Reviſed code, that after iſſue joined on the title only in ejectment, no exception of form or ſubſtance ſhall be taken to the declaration in any court whatſoever,

As to the twenty years poſſeſſion in Robert prior to his conveyance to Graves, it only proves that he had a good title in ejectment and a right to make that conveyance, and cannot operate as a bar by the act of limitation to the plaintiffs claiming under Graves, whoſe right of entry accrued only eight years before ſuit brought.

The third and principal queſtion is, whether the bargain and ſale of Graves (then out of poſſeſſion) to the plaintiffs, paſſed his title to them? As an objection to its paſſing the title, the ſtatute and act of Aſſembly againſt buying pretenſed titles, were relied on, as having, in addition to the ſevere penalty on the buyer and ſeller of the land, made the conveyance void. It is unneceſſary to conſider whether thoſe laws produced the effect contended for, ſince we are all of opinion that the purchaſe of the plaintiffs is not within the act of Aſſembly; which has this exception, "unleſs the perſon conveying or *thoſe under whom he claims* ſhall have been in poſſeſſion one whole year next before." Here Graves was the perſon conveying, and Bibb, the perſon in poſſeſſion, was him under whom Graves claimed; ſo that, literally, Bibb is excluded from making the objection; and if it depended upon conſtruction, could the plaintiffs poſſibly ſuppoſe when they purchaſed, that Bibb's poſſeſſion was adverſe to the title of Graves, to whom he had conveyed the land with a general warranty? *Whether* a perſon out of poſſeſſion can convey his

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title by bargain and sale or any other statutory conveyance, seems settled by the decisions in England under their statute of uses; and our act of Assembly, *Rev. code*, 167, in conformity to those decisions, has added a clause, not in the statute of uses, that those conveyances shall transfer the possession to the use, as perfectly as if the bargainee had been enfeoffed with livery of seisin of the land *conveyed*. The court are therefore of opinion upon this point that the title of Graves passed to the plaintiffs by the bargain and sale; and gave them a good title against Bibb: And upon the whole, that there is error in the Judgment of the District Court; which is to be reversed with costs, and judgment entered for the plaintiffs.

M^{c} LEAN,
against
COPPER, & Others.

The verdict should find precisely whether there was livery of seisin, & therefore barely finding the memorandum indorsed upon the deed was but evidence of the fact, & insufficient, & a new trial awarded.

Quere: Whether a feoffment by one out of possession is no void?

IN ejectment for a lot of land in the town of Alexandria, brought by Elizabeth Copper, late Elizabeth Arrell, daughter of Richard Arrell deceased, and others against Archibald Mc Lean. The jury found a special verdict, which stated, That John Muir and Harry Piper, two of the trustees, for the town of Alexandria, being seized as the law requires, conveyed to James Mc Leod in fee. That Mc Leod entered, and died seized in the year 1770 intestate, leaving Robert Mc Leod, his son and heir at law: Who by deed of the 15th of September 1784, conveyed to Richard Arrell deceased; which was recorded on the 20th of the same month. That the said Richard Arrell died intestate about the year 1795, and the plaintiffs are his representatives and heirs at law. That the said Robert Mc Leod made a deed of feoffment and memorandum of livery of seizen to James Kirk (under whom the defendant claims) on the 24th of December 1783, which deed and me-

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morandum were recorded on the 23d September 1784. That Robert M'Leod was a citizen and inhabitant of Maryland, *but that the deed was executed by him in Alexandria, and was attested by witnesses residing there.* That Arrell before the conveyance to him, had notice of Kirks deed. That Arrell gave a bond to Robert M'Leod, conditioned for the payment of £30, if Kirk or his representatives should not recover the land of Arrell; which is dated the 15th September 1784, and recorded 20th January 91. That Robert M'Leod, when he conveyed to Kirk, was not in possession. *That James M'Leod had made a verbal sale to Watson, who entered, and was possessed; and being so possessed, sold to Rigdon,* 14 *September* 1770, *and gave bond to make a title. That Rigden by will, on* 22 *April* 1772, after some specific bequests, devised to his wife Elizabeth Rigdon in fee *all the rest of his estate both real and personal,* and died 19 May 1774. That the said *Elizabeth Rigdon, on* 28 *February* 1775, *assigned the said bond to Arrell,* who entered on the said land in consequence thereof, enclosed it, and peaceably and quietly held it till his death. *That Kirk, on* 24 *December* 1783, *gave a bond to Robert M'Leod for payment of £*130. *on being put into possession of the lot, which Robert M'Leod, on* 19 *March* 1787, *assigned to Arrell.* That Kirk at the time of giving said bond knew that Arrell was in possession, and would dispute the title to the lot.

The District Court gave judgment for the plaintiffs; and the defendants appealed to this court.

RANDOLPH for the appellant. We have a regular title, which can be objected to upon two grounds only; that is to say, 1. That the deed was not recorded within eight months, 2. That Kirk knew of Arrells title when he took the deed. As to the latter, it is not a proper subject of enquiry in a court of law, but if the plaintiff could have supported his case, at all, it must have been in a court of equity. And as to the first, the act of

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1784, ſpeaks of perſons reſident in Virginia, which M'Leod was not; for the verdict finds that he was a citizen and inhabitant of Maryland. Of courſe his having accidently come into Virginia will not ſatisfy the act, which ought to be conſtrued ſtrictly. A third objection perhaps will be, that M'Leod, at the time of making the deed, was out of poſſeſſion. But, as to this, the court is refered to the argument in *Duval* vs *Bibb*.* Beſides livery of ſeizen was made in this caſe; which neceſſarily ſuppoſes poſſeſſion: And therefore, as the verdict only finds that Arrell was poſſeſſed when the deed was made, the court will intend that the livery was made, at another time; which will remove the objection. *Co. Litt.* 48, 266. The plaintiffs title is liable to this exception, that the verdict finds Arrell knew of our deed at the time of taking his.

LEE *contra.* It is clear that Kirk knew of Arrells right before his purchaſe; and the notice affects the appellant. 2 *Pow. Mortg.* 296. M'Leod was out of poſſeſſion at the time of making the deed to Kirk; which therefore is wholly void, *Co. Litt.* 369, 2 *Black. com.* 314. *Plowd.* 88: But as Arrell was in poſſeſſion, the deed to him was effectual, and perfected his title, as the ſame books prove. It is not material that M'Leod was a citizen of Maryland. For the deed was executed in Virginia; and the witneſſes might have been compelled to attend at court, and prove it. Of courſe, as the act of Aſſembly is expreſs, the failure to record it within the eight months avoids it againſt a purchaſer for valuable conſideration.

CALL on the ſame ſide. The act uſes the word *reſident* in the ſtate at the time of making the deed; which expreſſion is fully ſatisfied by the grantors being within the limits of the ſtate; and therefore recording within the 8 months could not be diſpenſed with. There was no fraud in Arrell in taking a deed; becauſe he had a prior equity. For the verbal ſale to Watſon was good; and the

* *Ante.*

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title from him is regularly deduced. But the converse of this doctrine holds againſt Kirk; becauſe, finding another in poſſeſſion, he ought to have enquired before he purchaſed; for the poſſeſſion was notice of our equity.

RANDOLPH in reply. The verdict does no find the facts with preciſion. It does not appear whether livery was actually made or not, but leaves it wholly uncertain. It is material that M'Leod was not a citizen of Virginia; becauſe the buyer has a right to two modes of probat, that by witneſſes, and that by acknowledgment of the party in court. But the argument, on the other ſide, tends to deprive him of the latter.

Cur. adv. vult.

PENDLETON Preſident delivered the reſolution of the court. This is an appeal from the Diſtrict Court of Dumfries, where the appellees brought an ejectment againſt the appellant for a lot and half an acre of land in the town of Alexandria, in which there was a ſpecial verdict, ſtating that the truſtees of that town, being ſeized of the lot in queſtion, by deed dated the 30th May 1765, conveyed it to James M'Leod, who died ſeized in 1770, leaving Robert M'Leod his ſon and heir. That James the father in his lifetime, made a verbal ſale of the lot to Joſeph Watſon, who entered and was in poſſeſſion thereof; and September 14th 1770, gave a bond to Edward Rigdon in the penalty of £100, conditioned for making a good right to the lot, and defending it againſt all perſons whatſoever. That Rigdon by his will dated April 22d 1762, deviſed the lot, as part of his reſiduary eſtate, to his wife Elizabeth in fee. That Elizabeth on the 28th of February 1775, in conſideration of £15 aſſigned the bond and her right to the lot, to Richard Arrell, who in 1776 entered into poſſeſſion of the lot, incloſed it, and quietly held it till his death, and for the greateſt part

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of the time occupied it as a *grass* lot. That on the 24th of December 1783, Robert M'Leod of Frederick county, in Maryland, by feoffment, in conſideration of £170 ſpecie, conveyed the lot to James Kirk of Alexandria, in fee with a general warranty, on which deed there is a memorandum, that on the ſame day peaceable poſſeſſion of the lot was given by M'Leod to Kirk in preſence of the ſubſcribing witneſſes; alſo a receipt for the conſideration money; and there is a certificate of the clerk of the corporation court of Alexandria, that this deed, memorandum, and receipt, were proved by the witneſs and ordered to be recorded, on the 23d September 1784, more than eight months, but leſs than two years, from the date of the deed, which the jury find was executed in Alexandria, where the witneſſes alſo reſided. On the ſame 24 of December 1783, James Kirk entered into a bond to Robert M'Leod in the penalty of £250, reciting the conveyance to him, but that the lot is yet in poſſeſſion of Richard Arrell and others, who diſpute the title, and the condition is, that Kirk ſhall pay £130 without intereſt after his being put into poſſeſſion of the lot and an undeniable title in fee made, which bond M'Leod on the 19th of March 1787, for £112 8 6, aſſigned to Richard Arrell. They find that Robert at the time of his conveyance to Kirk was out of poſſeſſion, and that Kirk knew at the time that Arrell was in poſſeſſion, and would diſpute the title. That Robert M'Leod by bargain and ſale, dated the 15th of September 1784, and duly recorded, conveyed the lot to Richard Arrell in fee, with a general warranty. That Richard Arrell at the time had notice of M'Leod's deed to Kirk. On the ſame day Arrell executed a bond to M'Leod in the penalty of £600 reciting that conveyance, and the former one to Kirk; and the condition is, that, if Kirk recovered the lot, the bond was to be void; and if Kirk failed, and Arrell's title was eſtabliſhed, and Arrell ſhould in that caſe pay £300 to M'Leod, by three ſeveral inſtallments, the bond was

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alſo to be void. That Richard Arrell died inteſtate in poſſeſſion of the lot, in 1795, and that the plaintiffs are his heirs, how or when they loſt the poſſeſſion, ſo as to become plaintiffs, is not ſtated. The equitable title ſuppoſed to be derived from the verbal ſale of James M'Leod the father, to Watſon, may be placed out of the queſtion: ſince it has no effect upon the legal title; and, if the plaintiffs go into a court of equity, circumſtances may be oppoſed of weight ſufficient to prevent relief: As may alſo the diſpute, whether Robert's deed to Kirk was recorded within time; ſince the act only declares a conveyance, not recorded, to be void as to ſubſequent purchaſers without notice, and Arrell is found to have had notice: And we come to the queſtion on the legal title. From this ſpecial verdict it appears that both parties claim under Robert M'Leod; the defendants by a prior deed in December 1783, and the plaintiffs by a ſubſequent deed in September 1784; and the prior deed muſt prevail, unleſs its operation is prevented by the adverſe poſſeſſion at the time of making it; as to which fact the ſpecial verdict is uncertain, if not contradictory, for it ſtates that Arrell in 1776 entered into poſſeſſion of the lot, & quietly held it till his death in 1795, and that Robert, at the time of his conveyance to Kirk, was out of poſſeſſion; which might be true, and yet it might alſo be true, that Robert, after the conveyance, might peaceably enter into the lot, ſo as to make livery of ſeizen, if no perſon, claiming under Arrell, was then upon the lot; of which the memorandum indorſed on the deed and proved by the witneſſes, is a very ſtrong evidence, and which is rendered probable alſo, by the nature of Arrell's occupation as ſtated, ſince he occupied it as a graſs lot; but ſtill, however ſtrong, this is only evidence; and the fact, whether there was an actual and peaceable entry, ſo as to make the livery effectual, ought to have been decided by the jury, eſpecially as they ſtate on adverſe poſſeſſion, with notice. The court is therefore of opinion that they can-

not proceed to judgment upon this verdict, it being uncertain, if not contradictory, as to the material facts of Arreli's continual poſſeſſion from 1776 to 1795, and Robert M'Leod's peaceable entry to make livery to Kirk in 1783. The judgment is therefore reverſed with coſts, and a new trial awarded.

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MURRAY & Others, *againſt* CARROT & Co.

CARROT, Koſters and Company brought *Indebitatus aſſumpſit* againſt Murray & Company, and declared for money had and received to the plaintiffs uſe. Pleas *Non aſſumpſit*, and the act of limitations. Replication that the plaintiffs were out of the ſtate. Iſſue.

If A purchaſe of B a foreign bill of exchange, which is afterwards loſt before it is preſented, and B refuſes to give a ſecond bill, A may bring indebitatus aſſumpſit for the purchaſe money.

If one as agent for another purchaſe a bill of exchange, and indorſes it to his principal, the latter may call the agent as a witneſs if he firſt prove that he was an agent merely, or give him a releaſe.

Upon the trial of the cauſe the defendants filed a bill of exceptions ſtating, that a witneſs proved that William Wilſon put into his hands, the original third bill of exchange, of which that produced is a copy, and requeſted him to carry it to Murray, inform him that the firſt and ſecond ſett had miſcarried in their paſſage to Europe; that Wilſon was apprehenſive that the ſaid third might meet with the like fate; and to requeſt that he would draw a fourth of the ſame tenor and date; which, if he refuſed to do, the witneſs was to get an acknowledgment, that Murray & Company had drawn the bill. That Murray refuſed to draw a fourth ſet, but in the courſe of the converſation admitted the bill then exhibited to have been drawn by Murray & Company. That the witneſs made the copy, exhibited, at the requeſt of Wilſon, by which it appears that the bill was payable to *William Wilſon*, or order; and by him endorſed to the plaintiffs for value in account with *D. J. Hoiſſard & Co.* That the plaintiff produced the ſaid

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William Wilson to prove that he had paid Murray & Company the full value of the bill, and that he made the payment and received the bill as agent for the plaintiffs: That the defendant objected to his competency, but, upon his swearing that he was agent as aforesaid, and had no interest in the suit, the court overruled the objection, and allowed him to be sworn in chief. That he deposed that the original bill had been lost before it reached the drawer; that as agent for the plaintiffs he applied to Murray and Company for another bill of the same tenor and date, offering to indemnify them against the former bills, but they refused to give it. Whereupon he obtained, from the other witness, a copy of the said bill. That the defendant prayed the opinion of the court, whether the plaintiffs were not bound to prove that the original bill or a copy thereof was presented to the drawee? but the court gave it as their opinion that, under the circumstances, it was not necessary to prove that the original, or a copy, was so presented. Verdict and judgment for the plaintiffs; and the defendants appealed to this court.

WICKHAM for the appellant. Wilson was an interested witness, and his *voir dire* could not decide the contrary, for it appeared upon the face of the bill, which was drawn in his favour, although he says it was as agent for Carrot Kosters & Co. to whom he was liable by his indorsement; and he would have been particularly so to future indorsees. It is even true that proof from any other quarter, that he was not interested, would not have been admissible, as he appears to be so on the bill; for parol evidence cannot contradict that which is written. Wilson was the legal owner, and might, and did assign it. Indebitatus assumpsit was not maintainable. It should have been a declaration on the custom, or an action of debt under the act of Assembly. There is no privity of contract, except between drawer and payee, indorsor and indorsee &c. *Wood* vs *Lustrel* 1

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Call, 232. No action lay at common law; for there was no engagement, either expreſs or implied, to return the money. There is no evidence that the bill was loſt; and if there was, there is no inſtance at common law of a ſuit upon a loſt bill. It ought to have been a ſuit in chancery.

LEE *contra*. Murray & Co. were bound to pay ſomebody; and therefore they are not injured by the preſent judgment. But Wilſon was a competent witneſs, for he was merely an agent, and, if rejected, various tranſactions between men cannot be proved. Indorſers have been frequently admitted to prove that a bill was given upon an illegal conſideration. *Jordaine* vs *Lashbrook* 7 *Term rep.* 601. Which is preciſely the ſame caſe with the preſent; for, there, no other witneſs could be had but the Indorſor, and that is the caſe here. The plaintiffs could not have ſued Wilſon; for the bills never reached them; and therefore they could not have founded an action on them. The parol did not go to contradict, but merely to explain the written evidence. It went to ſhew that the property was in another perſon, and not in the witneſs. 1 *Black.* 294, 1 *Wash.* 14. With regard to the privity, it is a rule, that wherever debt lies, *indebitatus aſſumpſit* will lie alſo; and therefore as the act of Aſſembly gives debt, it neceſſarily eſtabliſhes the privity. 2 *Black.* 1269. The action was for the money advanced, and not upon the bills; which rendered it unneceſſary to ſhew that they were loſt. It was not neceſſary to reſort to a court of equity; for no diſcovery was wanting: And this being an equitable action, complete juſtice could be done.

WICKHAM in reply. The caſe of *Jordaine* vs *Lashbrook*, 7 *Term rep.* 601, differs from this; for, in that caſe, the evidence of the witneſs went to deſtroy the bill, but here it goes to ſupport it; in that caſe, therefore, the witneſs ſwore againſt his own intereſt, but here in favour of it:

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For, if the bill was paid, Wilson cannot be sued, whereas, in the other case the endorsor was still liable.

Cur. adv. vult.

LYONS Judge delivered the resolution of the court, as follows.

The first and principal question in this case is, whether an action of *Indebitatus assumpsit*, for money had and received, will lie, by the purchaser, for the money paid to the drawer of a bill of exchange, when the bill is lost, before it is presented to the drawee, and the drawer refuses, either to refund, or renew, the bill to the purchaser?

The contract, on the purchase of a bill of exchange drawn on a foreign country, is for money in the foreign country, and not merely for the paper bill, or draft itself; which is only evidence of the contract, with a power to demand and receive the money. Therefore if the bill be lost, the drawer cannot be entitled to retain the purchase money here, and have the foreign money too; or, which comes to the same thing, prevent the purchaser from receiving it by refusing to enable him to do so. For the purchaser has a right to his purchase money with interest if he cannot get the foreign money, unless in case of the insolvency of the drawee, the drawer has sustained a loss by the negligence of the purchaser in not presenting the bill, or giving notice of the protest, in due time.

If then the purchaser has a right to receive the foreign money, the drawer is not injured by drawing twenty bills of the same tenor and date; but he ought, in justice, to do it, if it be necessary, in order to enable the purchaser to receive the money. Therefore if he refuses to do so, the purchaser

must have a remedy for the injury, and the action brought in the preſent caſe ſeems to be the proper one, as it lies in all the circumſtances, and produces ſubſtantial juſtice in the end. Murray, *vs.* Carrot.

The next inquiry then is as to the propriety of the evidence.

The firſt thing neceſſary on the trial of a cauſe of contract is to prove a contract; and if a written one, the original ſhould be produced, unleſs loſt; and then a copy, which is the next beſt evidence, if it can be had. In the preſent caſe a copy was produced; but to entitle the plaintiff to uſe it, ſome account of the loſs of the original was neceſſary to be given by him, and that he was a purchaſer of the bill, ſo as to eſtabliſh a privity. This he attempted to do by calling Wilſon, to whom the bill was made payable, and who indorſed it to the appellee for whom he had purchaſed it as a friend, or agent, without having any intereſt in it himſelf. The witneſs was objected to, however, on the ground of intereſt, as he had indorſed the bill, and no proof was offered to ſhew his agency, except his own oath. But a factor, or agent on mere commiſſion, and not further intereſted, may be a witneſs for either party. The *King* vs *Bray*, *Cas. Temp Hardw.* 358, *Dixon* vs *Cooper* 3 *Wils.* 40. In theſe caſes, however, the factors only executed their powers in making the contract, without doing any act which might eventually ſubject them to loſs, or to the action of either party; and therefore did not appear *prima facie*, intereſted in the event of the ſuits. But here the witneſs *prima facie* did appear, intereſted, by his having indorſed the bill, which made him liable for it to any indorſee, or holder, not having notice of the agency. Therefore to render him competent, it ought to have been ſhewn, by other teſtimony than his own oath, that he was an agent, or he ſhould have been releaſed by the appellees: It follows, that the court erred in admitting him,

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without such proof of agency, or a release. The judgment is therefore to be reversed, and the following judgment entered.

The court is of opinion, that William Wilson, who purchased and indorsed the bill of exchange, in the proceedings mentioned, ought not to have been admitted as a witness until it was proved by other evidence than his own oath, that he was authorised by the appellees to purchase the said bill for, and on account of the said appellees, and that he transacted the business as their agent only; or until the appellees had released him from all actions and suits on account of his indorsing the said bill to them; and that the said judgment is erroneous; therefore it is considered that it be reversed with costs; that the verdict be set aside, and a new trial had in the cause; on which the said William Wilson is not to be allowed to give evidence, unless it is first proved that he was authorised to purchase the said bill, and to transact the business in the manner above mentioned, or is released by the appellees from all actions and suits on account of his indorsing the said bill to them.

BERKLEY, *against* COOK.

Variance between the declaration and the evidence, and between the judgment, and the declaration, is error.

BERKLEY as treasurer, brought suit in the General Court against Turner, Cook and Reese, as securities of Rogers, sheriff of Southampton, upon the said Rogers's sheriffs bond. The declaration stated the bond as joint and several, and that all the obligors executed it. The breach assigned was, the non payment of the taxes, which ought to have been collected in the year 1785. The defendant Cook only appeared; plea conditions performed.—Issue. Upon the trial of the cause the defendant filed a bill of exceptions stat-

ing, that the plaintiff offered in evidence to the jury, the record of a judgment againſt Rogers *for the balance of the taxes collected by him for the year* 1786, purſuant to the act of Aſſembly for redeeming certain certificates; to which the defendant objected, and inſiſted that he ought to be at liberty to conteſt the amount claimed by the public at the time of rendering the ſaid judgment, by ſhewing that, as the taxes were payable in certificates and facilities, and the ſheriffs by various laws are allowed to diſcharge their arrears by ſuch certificates and facilities, the jury are authoriſed to enquire, whether the certificates and facilities were, at the time for payment, or at the time of rendering the judgment aforeſaid, of equal value with ſpecie, and to adjuſt their damages accordingly: And, alſo, that the jury were at liberty to conſider, whether they were bound to charge the ſaid Rogers with the fifteen per cent damages given by law upon motions againſt ſheriffs, or might not, unbound by that law, judge of the damages which the ſaid Rogers ought to have paid for his default: But the court decided that the judgment againſt the ſheriff was *conclusive evidence against the security in this case*, and refuſed to permit the defendant to enter into any enquiry touching its merits. Verdict and judgment for the plaintiff; and the defendant obtained a writ of ſuperſedeas from this court.

CALL for the appellant. I. The judgment ought not to have been given in evidence, as it was not mentioned in the declaration, but actually varied from it. 1. Becauſe the allegation in the count is not, that the defendant had not paid the judgment, but that he had not collected and paid the taxes. So that the *allegata* and *probata* do not agree together. 2. Becauſe the declaration is for the taxes of 1785, and the judgment for thoſe of 1786: Which is a manifeſt variance, as he could not come prepared to defend himſelf upon a charge of 1785, for the taxes of 1786.

Berkley, vs. Cook.

II. The judgment was not concluſive: 1. Becauſe, if two are ſued in ſeparate actions of debt on the ſame bond, ſeveral damages muſt be found, *Sayer's law of damages*, 147: Which proves that the firſt judgment is no meaſure. 2. Becauſe the judgment was rendered in a different ſpecies of action, where the trial was by the court, and not by the jury: Whereas the defendant, in the preſent caſe, had a right to the verdict of his peers to aſcertain the amount; which could not be, if the judgment was concluſive. 3. Becauſe the damages are perſonal to the ſheriff, and do not extend to his ſecurities. For it is a penalty; and therefore not covered by the ſheriffs bond. 4. Becauſe the judgment was by default; and, being *res inter alios acta*, ought not to bind third perſons. 1 *Call* 51. 5. Becauſe, if admiſſible at all, it was only *prima facie* good; and the defendant ought to have been permitted to ſhew that it was for too much.

III. The value of facilities only was demandable. 1. Becauſe it was not a debt due from the ſheriff, but a neglect to perform a duty; and this at a particular period. Conſequently the damages ought to have been meaſured by the value at the period of the breach. 2. Becauſe if it be conſidered as a debt, then it was the value when they ought to have paid. 3. Becauſe if they were conſidered as the papers of the public, converted by the ſheriff to his own uſe, then the value at the time of converſion, or at moſt of the ſuit, ought to have been the rule. *Woodson* vs *Payne* 1 *Call* 573. 4. Becauſe the ſheriff could only have enforced facilities; and therefore he ought not to be liable for more than he could compel. 5. Becauſe the taxes were made payable in facilities, ſo that *pro hac vice* they were equally a currency with ſpecie. Of courſe the ſheriff was only delinquent in not paying facilities of that date. 6. Becauſe the defendant, as payer, had ſtill a right to have paid in thoſe very facilities; and therefore the court could not deprive him of it.

Berkley, vs Cook.

IV. There were four obligors in the bond; and three only are ſued; which is error; and may now be taken advantage of, as it appears upon the declaration, and the plaintiff has not accounted for the omiſſion. 5 *Bac. ab.* 164, 2 *Black. rep*, 697, 5 *Bac. ab.* 697, *Hard.* 198, *Sid.* 238, *Stiles* 50.

NICHOLAS *contra.* The judgment was concluſive, as it aſcertained the amount of the claim; and it was a debt due in fact from the ſheriff and his ſecurities; for whatever was due from the ſheriff was due from the ſecurities. There was no ſurpriſe in obtaining it, as the ſheriff had notice; and it is more convenient that all ſhould be bound by the enquiry againſt the ſheriff himſelf, who has the beſt knowledge of the defence proper to be ſet up. There is nothing in the record to ſhew the ſtandard by which the value of the ſecurities was aſcertained; and the doctrine contended for would be highly detrimental to the public, to whom the certificates were worth their *par* value. The ſecurities are liable to the 15 per cent damages; for it is the act of the ſheriff which produces them, and the law ſays he ſhall pay them. That all the obligors were not ſued makes no difference; for it ſhould have been plead in abatement, *Co: Lit.* 485, *Allen* 21, 41, *Cro Eliz.* 494, 544, 5 *Co.* 119.

The court gave no opinion on the merits, but reverſed the judgment on account of the faults in the proceedings.

ROSS,
againſt
COLVILLE.

A ſequeſtration is proper, if the defendant obſtinately lies in jail to ſave his eſtate, or exhauſts it in paying other creditors, to the injury of the plaintiff.

Quere: If an appeal lies to this court, from an order of the court of chancery awarding a ſequeſtration?

COLVILLE & co. obtained writs of *ſequeſtration* from the High Court of Chancery, againſt Roſs, in order to enforce performance of a decree. Roſs offered to appeal to this court; which the Court of Chancery allowed. Whereupon the motion to appeal and the allowance thereof, were entered on the record, which ſtates, that the defendant is in the priſon rules for his contempt in not performing the decree, and is charged in execution in other ſuits; that he has paid ſundry debts ſince he was ſo in jail; that he produced a deed conveying property for further ſecuring the plaintiffs, a copy of which is made part of the record: And that the defendants oppoſed the appeal, but the court allowed it.

WICKHAM for the appellee. It was not a decree that the appeal was taken from; but a mere award of proceſs on a decree already made. The ſecurity taken was collateral to the decree, and not a payment. A deed of truſt is not of ſo high a nature as a decree; and there is an expreſs ſtipulation that it ſhould not affect the decree. Beſides the appellant might purſue all his remedies at once, for a man may proceed at law upon his bond, and in equity upon his mortgage.

DUVAL *contra*. The party may appeal from an award of execution, *Harriſon* vs *Tompkins*, 1 *Cal* 295. A ſequeſtration ought never to iſſue where the application for it is unconſcionable; and here it was unreaſonable in the plaintiff to aſk it, when he had ſuch abundant ſecurity for his money.

WARDEN on the ſame ſide. The act of Aſſembly allows an appeal from any final order of an inferior court. *Rev. cod.* 67: And this expoſition is expreſſly confirmed by the caſe of *Harriſon* vs *Tompkins*.

WICKHAM in reply. If the defendant having property enough to pay his debts, lies in prison for a long time rather than satisfy the decree, he lies there obstinately; and therefore it is right to sequester his estate, until he will comply. Besides the order states, that it was awarded for good cause shewn.

Ross, vs Colville,

Cur adv. vult.

PENDLETON President delivered the resolution of the court as follows:

This is an appeal from an order of the High Court of Chancery, awarding writs of sequestration upon a former decree in favour of the appellees against the appellant; which is stated to have been done for good cause shewn, and we presume the reasons assigned were satisfactory, since the appellant did not, by exception, place them upon the record, to enable the court to judge of their force.

What the appellant states by way of objection, is very unsatisfactory; first he is in custody for contempt of a decree of that court, not stated to be the decree of the appellees; or, if it had been, it was no objection to the sequestration; which perhaps might be awarded, altho his body is in confinement, if it shall appear that he obstinately resolved to lie in prison, to save his estate. His second objection that he has been paying debts since he was in prison, seems rather a good reason for awarding the writs, as he is thereby exhausting his funds in prefering other creditors to the injury of the appellees. His third objection is on account of the deed of trust, by which certain property was conveyed to trustees to be sold by them, or any one, to satisfy the installments as they should become due; which the court at first thought a reasonable objection; since it did not appear to be on the footing of a common mortgage as a collateral security, but answering the effect of a se-

Ross, *vs.* Colville.

queſtration by an immediate ſale for ſatisfaction; and the rather as the counſel for the appellees was one of the truſtees, and had alone a power to ſell at any time. But on further reflection, conſidering that there might be prior incumbrances on the property, or that the appellant might withhold the poſſeſſion of it in order to prevent a ſale, which might have been part of the good cauſes ſhewn, the court is now of opinion that the order ought to be affirmed with coſts, leaving the queſtion whether the appeal ought to have been allowed, to be decided in ſome future caſe, wherein it ſhall be neceſſary.

THORNTON,

againſt

CORBIN.

Semble, that a depoſition taken under a commiſſion awarded before the bill was filed, and executed by two perſons, of whom one was not a magiſtrate, may be read in a ſubſequent ſuit

A parol marriage contract, made before the act of 1785, ſupported againſt a ſubſequent voluntary conveyance.

THORNTON as truſtee for the eſtate of Joſeph Robinſon brought a bill in Chancery againſt Corbin, ſtating,—That Benjamin Robinſon the elder, on the 10th of February 1757, conveyed 450 acres of land, including a mill in truſt, as to the mill, for himſelf, and wife, who is ſince dead, for their lives; and from and after the death of the ſurvivor, in truſt, as to a moiety of the mill &c. for Joſeph Robinſon in fee, and, as to the other moiety and the lands, in truſt for Benjamin Robinſon the younger, in fee tail, with remainders over. That Benjamin Robinſon the younger took poſſeſſion and died ſeized of the lands, and of a moiety of the mill, in tail; leaving Benjamin Robinſon his eldeſt ſon and heir, who ſold to the defendant. That Joſeph Robinſon conveyed his moiety of the mill to the plaintiff, in truſt to ſell and pay his debts. And therefore the bill prays an account of a moiety of the profits of the mill, and for general relief.

Thornton, vs Corbin.

The anſwer ſtates, that the defendant has ſeen a deed, of the 10th of February 1757, to Pendleton (whichd he ſuppoſes is that ſpoken of in the bill) and if it ha conveyed any thing, in the ſaid mill, Pendleton would have the legal eſtate: But that it did not convey any thing; becauſe Benjamin Robinſon the elder had before parted with the equitable eſtate therein to Benjamin Robinſon, the younger. That the defendant has heard of a former ſuit in chancery, reſpecting a moiety of the mill; to which he refers. That the defendant bought the whole, from Benjamin Robinſon, the younger, and has had quiet poſſeſſion from the year 1783.

The equitable right mentioned in the anſwer, was a claim under a marriage contract; concerning which ſeveral depoſitions were taken in this ſuit, and one had been taken in the former ſuit mentioned in the anſwer.

Among the exhibits are, 1. A copy of the deed of truſt from Benjamin Robinſon the elder, to Pendleton. 2. A copy of a deed from Benjamin Robinſon jun. to Benjamin Robinſon ſen. which is dated 10 of March 1757, and after reciting a former deed from Benjamin the elder, to Benjamin the younger, for 1000 acres of land in Orange, and that the elder had ſince given the younger a tract of 500 acres in Caroline, in exchange for it, conveys the 1000 acres to Benjamin the elder, for the uſe of his ſons Charles and Thomas. 3. A copy of the ſaid recited deed for the Orange land, dated 27th September 1753. 4. A copy of the partition between Page and Benjamin Robinſon the elder, dated 2d December 1756. 5. A copy of the title bond from Benjamin Robinſon the grandſon to Corbin, dated 12th June 1782. 6. A copy of the deed of truſt from Joſeph Robinſon to the plaintiff, dated 10th November 1787.

Thornton, vs Corbin.

At the hearing in the county court, the reading of Thornton's depoſition was objected to by the plaintiff: Upon which Corbin filed a bill of exceptions ſtating the depoſition; that Thornton died before the inſtitution of this ſuit; that the defendant in that ſuit was the ſame perſon for whoſe benefit this ſuit is brought; that the clerk who atteſted the copy of the depoſition is dead; that it was objected to by the plaintiff, becauſe the certificate of the taking of the depoſition is ſubſcribed by Anthony Thornton, who was not then a juſtice of the peace, and by James Taylor, who ſays that he does not recollect whether he ſubſcribed the ſame, or whether it was taken; and that the court did not permit the ſaid depoſition of Thornton to be read.

Memoranda to the following effect appear in the record.

At November Caroline Court 1773, Thomas Slaughter was appointed guardian of Benjamin Robinſon, the ſon of Benjamin Robinſon the younger. At December Court 1773, a commiſſion was awarded to take the depoſitions of Anthony Thornton and Sarah Slaughter in the ſuit Benjamin Robinſon vs Joſeph Robinſon. At March 1774, the bill was filed. Auguſt 1782, attachment for anſwer: After which is a certificate of the preſent clerk, that theſe were all the ſteps taken in that cauſe; and that no depoſitions appear to have been filed.

There is alſo a memorandum ſtating that Thornton was recommended as a magiſtrate at Caroline September Court 1776, and not before.

The county court decreed a moiety of the mill and profits, to the plaintiff; from which decree, Corbin appealed to the High Court of Chancery: Where the decree of the county court was reverſed; and from the decree of reverſal, Thornton appealed to this court.

Thornton, *vs.* Corbin.

CALL for the appellant. The appellant was, under all the circumſtances, entitled to relief. Thornton's depoſition was not admiſſible; for, as the ſuit between the Robinſons had never been decided, the depoſition was never eſtabliſhed by the judgment of any court; and therefore might be excepted to, in this ſuit, in the ſame manner as it could in that: But, if ſo, then clearly it ought not to be read; becauſe the commiſſion to take it was improperly awarded; for it was before any bill was filed, *old Virginia laws* 177. And it appears by the teſtimony, in the cauſe, that one of the commiſſioners who took it, was not a magiſtrate.

WARDEN *contra.* It is not abſolutely neceſſary that the perſons who execute commiſſions to take depoſitions ſhould be juſtices of the peace, for any perſon may do it, if appointed by the commiſſion. That no bill was filed makes no difference; becauſe the act of Aſſembly merely applies to commiſſions granted by the clerk *ex debito juſtitiæ*, and not to ſuch as are granted by the court in ſeſſion.

WICKHAM on the ſame ſide. The commiſſion might be executed by a perſon not a magiſtrate; and all foreign commiſſions are thus executed. That the bill was not filed is not material, as the caſe might have been urgent. And the act is affirmative that the clerk *may* grant, and not negative, that the court *ſhall not* grant, a commiſſion during term, unleſs the bill be filed. Beſides this exception was not taken at the hearing in the county court. The court of equity had no juriſdiction, as the ſtatute executed the uſe to the poſſeſſion; and therefore an ejectment might have been brought. But the deed to Thornton was clearly void, as Joſeph Robinſon was out of poſſeſſion at the time of making it. Beſides Joſeph Robinſon ought to have been made a party to the ſuit.

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RANDOLPH in reply. The court of equity had juriſdiction, becauſe it was a truſt; which alone confered juriſdiction. Beſides there was no plea in abatement, and therefore it is too late to object now; for the act of Aſſembly precludes it. The point relative to Joſeph Robinſon's being out of poſſeſſion is now under conſideration of the court, in *Duval* vs *Bibb*.* None but a magiſtrate can execute commiſſions to take depoſitions within the ſtate. The marriage contract, even had it been proved, is not recorded; and therefore is void againſt Joseph Robinſon.

WICKHAM. He was a mere volunteer; and therefore has no ſuperior equity.

RANDOLPH. The act of Aſſembly only uſes the word *purchaser*; and does not ſay for valuable conſideration. *Ward* vs *Webber*, 1 *Wash.* 274.

Cur. adv. vult.

ROANE Judge the weight of teſtimony in this cauſe being in favour of the appellee, independantly of the teſtimony of Anthony Thornton, it is unneceſſary to decide how far his depoſition is admiſſible, or not, in conſequence of its having been taken before a perſon who is alledged to have been no magiſtrate. I ſhall barely remark however, that this caſe differs from that of *Blincoe* vs *Berkley*, 1 *Call*, 405, in that here a commiſſion was regularly awarded by the court; the parties attended in purſuance, and as no objection was taken to the depoſition at the time, it ſhall either be intended that Anthony Thornton jun. was then a magiſtrate, or that the parties agreed that the depoſition might be taken before him. The certificate that that gentleman was not recommended to the Governor until a poſterior time, is not concluſive evidence, that he was not a magiſtrate before, as it was in ſome inſtances probably the practice to commiſſion perſons, who had not been recommended.

* *Ante.*

Thornton, vs. Corbin,

I throw this out however, only as my preſent impreſſion. The teſtimony of Mrs. S. and T. S. go directly to eſtabliſh a marriage agreement on the part of old Colonel Robinſon. This was a moſt intereſting fact for the family, and one which would have made an indelible impreſſion. It is only confronted by the belief of Mr. Pendleton that Mr. Benjamin Robinſon's firſt knowledge of his title was derived from *him*, in or about the year 1755; but as he does not ſpeak from his memoranda at the time, it is probable he may be miſtaken as to the year; and even if not, the pleaſure diſcovered by old Mr. Robinſon on the information received from him, may have ariſen from his great reliance on the judgment and profeſſional ſkill of that gentleman, and conſequently may not be inconſiſtent with a knowledge on this ſubject previouſly derived from other ſources. Admitting then this teſtimony to be as reſpectable as any whatever, yet it is overbalanced by that of the two witneſſes before named; and their teſtimony is confirmed by that of Barnes.

Great ſtreſs was laid by Mr. Randolph on the deed of 10th March 1757, for the Orange land, (by B: R. jun.) which he ſuppoſes contains a recognition of the deed of the 10th February 1757; but it only admits the fact, that Benjamin the father had before conveyed to him the Caroline land. This was probably from verbal information, as the deed of February '57, was probably then in the Caroline office, It is certainly however by no means inferrable from the deed, of Mar. 10, that that of February had ever been ſeen by him; far leſs that he was a party to it; and, if that deed varies from the terms of the marriage promiſe, it was not obligatory on him.

Mr. Randolph contended that the marriage promiſe was void againſt purchaſers under the act of Aſſembly. Admitting (which cannot be denied) that parol marriage agreements were then valid,

Thornton, *vs.* Cousin.

according to this doctrine the *promisee* would have nothing to do but refuse to execute the deed, and then convey the land, which would defeat the promise. The admission therefore is inconsistent with the conclusion he draws. The intention of the act was certainly not of this kind, it was to compel persons, who had written contracts or agreements to record them for the information of others within a reasonable time.

I am therefore of opinion that the case is a plain one, and that the decree of the Chancellor ought to be affirmed.

FLEMING Judge. The first question, made at the bar, was, Whether the marriage contract was established? And I am of opinion that it is. Thornton's deposition, which clearly proves it, is objected to, as having been illegally taken; but, besides that if it were necessary to investigate the point it would perhaps turn out that the objection is not well founded, there is ample testimony to support the contract: For the depositions of the two S's. are full to that effect; they state the circumstances with such precision as to leave no doubt upon the mind: and they contain nothing which is inconsistent with that of Mr. P. who, like them speaks merely from memory, and may have been mistaken as to dates.

It was said, however, that even if the contract were proved, yet still it was destroyed by the deeds of September 1753, and March 1757: because the first merged the parol contract, and the latter recognized the right of Joseph. But I am of a different opinion: For the object of that of September was only to secure the Orange land to Benjamin the son, in case the moiety of Page's was not recovered; but as soon as that should be recovered it was to be conveyed, and the other restored: Therefore so far from this deed merging, it rather affirmed, the marriage contract: And, with

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respect to that of March, it does not appear that Benjamin the son, if he meant to refer to the trust deed, had ever seen it, or knew what it contained; for he states it to be for 500 acres without any restriction, although it gave him only 459 acres after the death of his father and mother, with a moiety, instead of the whole, of the mill; and even these were to be held in tail, instead of feesimple. Hence it is plain that if he did mean to refer to that deed, he was a stranger to its contents, and was deceived as to the purport of it: Which mistake the father, never removed, but, on the contrary is said, by one of the witnesses, to have been in the habit, long afterwards, of speaking of the whole mill, as belonging to Benjamin the younger after his own death. Of course no inference can be drawn from this supposed recognition.

But then it is urged that the marriage contract, not having been recorded within the eight months, is void against purchasers by the act of Assembly, *old Edit. laws*, 143. The purchasers meant in that act, however, are those for valuable consideration, and not mere volunteers. Of course the argument does not apply to the present case. But to remove this difficulty it was said that the gift to Joseph was a provision for a younger son, and that this was a good consideration. The observation, at first sight, is plausible; but there is no force in it. For, besides that Joseph was, in fact, the eldest and not the younger son, it appears, by his deed of trust to the appellant, that his father had devised to him the *Moons-mount* estate, containing 1100 acres, which was, probably, a better provision, than that made for his brother Benjamin.

There are other circumstances which have some weight; For it seems that Joseph, abandoning his claim under the deed of trust, relied upon the will to support his right; that after Benjamin the grandson sold to Corbin, he gave

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him poſſeſſion in the preſence of Joſeph, and that the latter even turned his own miller out of the mill, and ſuffered Corbin to remain in quiet poſſeſſion for ſeveral years, before he executed the deed to the plaintiff. This ſhews his own conviction on the ſubject, and ſerves to ſtrengthen his brothers title.

Upon the whole, I think the decree of the High Court of Chancery is right, and ought to be affirmed.

CARRINGTON Judge. Concurred that the decree of the High Court of Chancery ſhould be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
MAY TERM OF THE YEAR 1803.

MINOR,
againſt
GOODALL.

WARDEN for the appellee. Moved to diſmiſs the appeal, becauſe the ſum decreed was under a hundred dollars; and therefore the cauſe below the juriſdiction of the court.

If the matter in diſpute between the parties exceed 100 dollars, this court has juriſdiction.

CALL *contra.* Although the decree is for leſs, yet the matters in diſpute between the parties amounted to much more; and therefore, as the party has a right to the opinion of this court whether the Chancellor decided rightly upon the ſubjects of controverſy, the appeal was properly allowed, and this court has juriſdiction.

Cur. adv. vult.

LYONS Judge. Delivered the reſolution of the court, that, although the decree was for leſs than 100 dollars, yet, as the matters in diſpute exceeded that ſum, the court had juriſdiction.

The motion was therefore overruled; and, at a ſubſequent term, the decree was reverſed.

NELSON,
againſt
HARWOOD.

If a feme covert be privily examined, her covenant for further aſſurance in a deed is obligatory; and a ſpecific execution will be decreed.

NELSON'S deviſees filed a bill in the High Court of Chancery ſtating, that, in the year 1774, their teſtator purchaſed of Harwood and wife a tract of land which was entailed upon the wife, and took a bond from Harwood for procuring the entail to be docked. That Harwood and wife in December of the ſame year, executed a deed to the teſtator for the ſaid lands, and covenanted therein that the grantee and his heirs, &c. ſhould peaceably enjoy; that the grantors would warrant, and make further aſſurances: To which deed the wife was privily examined. That the teſtator paid the purchaſe money to Harwood; and an act paſſed the Aſſembly in 1775 for docking the entail, but Earl Dunmore having by that time abdicated the government, his aſſent thereto was not obtained. That the wife was living ſince the paſſing of the act for docking entails in the year 1776, ſo that the feeſimple veſted in her; but ſhe is now dead, and the defendants are her children and coheirs. That they refuſe to releaſe to the plaintiffs. Wherefore the bill prays a conveyance, and for general relief.

The defendants demurred to this bill; and the plaintiffs thereupon filed an amendment ſtating, that by the ſaid private act of Aſſembly for docking the entail of the ſaid tract of land, a truſtee was appointed to receive the purchaſe money, to be veſted in another eſtate; and that the plaintiffs teſtator paid the money to the ſaid truſtee. By conſent the demurrur was to ſtand as a demurrer to both bills. The Court of Chancery allowed the demurrer, and diſmiſſed the bill. From which decree the plaintiffs appealed to this court.

Nelſon, *vs* Harwood.

RANDOLPH for the appellants. There are three queſtions in the caſe. 1. Whether the demand, by the plaintiffs, how far Harwood applied the money received to the purpoſes of the truſt, was not a regular demand? 2. Whether a court of equity will not relieve againſt the accident which prevented the act from being duly paſſed? 3. Whether equity will not conſider that as done which ought to have been done, and therefore, as the feme ought to have executed a proper conveyance, whether a court of equity will not conſider it as actually made?

1. Upon the firſt point I contend that the Chancellor was clearly wrong in not overruling the demurrer, and obliging the defendants to anſwer how far the money had been applied to the purpoſes of the truſt. The plaintiffs ſought a diſcovery as well as relief in that reſpect; and in every inſtance where a diſcovery is ſought, for the ſake of enabling the plaintiff to obtain juſtice, it ought to be inforced. *Mitf. plead.* 149. The Court of Chancery therefore ſhould have compelled an anſwer to this point.

2. The facts here were intirely new in their nature, ſo that no appoſite precedent can perhaps be adduced, but then we are ſupported upon the reaſon of ancient principles, which rids us of the charge of deſiring to introduce novelty. If there had been any mode of conveying the femes intereſt without the interpoſition of the Legiſlature, there can be no queſtion but the money having been paid, a court of equity would have inforced the conveyance. But accident alone prevented the legiſlative interpoſition. For two branches had concurred, and it was owing to the voluntary abdication of the third that the law was not completed. This then was an accident which the purchaſer could not control, and which Chancery ought therefore to relieve againſt. *Fonbl. eq.* 8, 10. Beſides it appears by 4 *Inſt.* 45, that an ordinance of two branches is obligatory; and therefore the

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act in queſtion was binding, notwithſtanding the concurrence of the third was not obtained, through circumſtances which the purchaſer could not reſtrain.

3. The feme was bound in conſcience to complete ſuch a conveyance as would inſure the title; and as ſhe lived till after the act of 1776, the court of equity, conſidering that as done which ought to have been done, will enforce it now: Becauſe as ſoon as ſhe became capable, ſhe ought to have joined in a proper conveyance. Beſides her warranty obliged, and operates by way of *eſtoppel* againſt the heirs: 1 *Bac.* 496, 2 *Vern.* 61. This was rendered the ſtronger by the privy examination, which reſembles the caſe to a fine; and that would clearly have eſtopped the heirs. 4 *Com. dig.* 85.

WICKHAM *contra.* The Chancellor did right in ſuſtaining the demurrer. For the bill had made no proper caſe for his juriſdiction. The property belonged to the wife and children, and the money was paid to the huſband. So that no benefit accrued to the wife and children; and therefore there is no equity againſt them. The act was nugatory until the Royal aſſent was procured; and that having never been obtained, the act of the other two branches of the Legiſlature was utterly void. The bill does not ſuggeſt that the children ever received any part of the money; and therefore there can be no pretext for the juriſdiction of the Court of Chancery. Beſides if the act was really a law, the plaintiff had no occaſion to reſort to a court of equity to enforce his title.

The deed did not bind the feme; for all her acts, being void at common law, were only effectual ſo far as ſhe was enabled by ſtatute. But ſhe was not enabled by the act of 1748 to convey an eſtate tail, but the contrary; for that act declares ſuch eſtates ſhall not paſs without an act of the Legiſ-

lature. *Old edit. laws*, 133, 145. So that the act of 1748, only reſpects the eſtates which a feme covert might grant if ſole; and did not extend to an eſtate tail which ſhe had no power to convey.

The act in queſtion had no validity until the Royal aſſent was obtained. No acts of that kind had; and therefore in all of them there was a ſuſpending clauſe until that was procured. Of courſe the idea of any obligation in the law till the concurrence of the third branch of the Legiſlature was had, is not maintainable; and a contrary doctrine might lead to dangerous conſequences.

Such acts always ſettled an equivalent eſtate on the iſſue; which was not done here; for the children never received the money. So that if the act was really binding, it has never been complied with.

It it not correct to ſay that a court of equity, conſidering that as done which ought to have been, will enforce it againſt the heirs as ſhe lived until the act of 1776 had paſſed. For as neither ſhe or the iſſue received the money, there was no moral obligation on her; and the warranty did not bind as already obſerved. Becauſe the privy examination only paſſed ſuch eſtate as ſhe might lawfully depart with; and the warranty was merely annexed to that. So that it could not operate an eſtoppel. This obſervation anſwers the caſe cited from *Bacon's abridgment*, as it was clearly the caſe of a conveyance of an eſtate which the feme could lawfully convey. However what is deciſive on this ſubject is, that the deed here was void as to the inheritance, and therefore the warranty could have no operation. But ſuppoſing it had, the plaintiff then would have had a legal title, and therefore he had no occaſion to reſort to a Court of Equity.

Equity cannot relieve in a caſe of this nature;

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or elſe all the powers of government would be concentrated in that court; which is, and ought to be, bound by precedent, as well as a Court of Law.

Cur adv. vult.

ROANE Judge. This is a bill by the deviſees of T. Nelſon againſt the ſurviving huſband and children of Elizabeth Harwood deceaſed. It ſtates that Edward Harwood being ſeized in fee tail, in right of his wife Elizabeth, of a tract of land, ſold the ſame for a valuable conſideration to T. Nelſon (for which the money has been paid.) That Edward Harwood, with a ſurety, on the 12th of November 1774, gave a bond conditioned for the procuring an act of Aſſembly to dock the intail, and convey the ſame in fee to the ſaid T. Nelſon; and that the ſaid Edward and Elizabeth Harwood afterwards on the 7th of December 1774, by a deed of bargain and ſale duly recorded, and in reſpect of which ſhe was duly examined, reciting her title as above, conveyed the ſame in fee to the ſaid T. Nelſon, with a covenant for quiet enjoyment, and that the grantees would do all and every act and acts, and procure *all further necessary assurances* for perfecting his ſaid title therein, as he or his heirs ſhould adviſe or require. It further ſtates, that Mrs. Harwood ſurvived the act of 1776, converting eſtates tail into feeſimple. It alſo ſtates, that in 1774 an attempt was made to procure an act to dock the intail, which was fruſtrated by the diſſolution of the Aſſembly; and that in June 1775 a ſimilar bill was prepared, and received the joint concurrence of the Burgeſſes, and council, but did not receive that of the royal Governor, he having withdrawn himſelf on board an armed Britannic veſſel, and refuſed to come to the ſeat of government, and exerciſe the functions of his office. It prays that this latter defect may be conſidered as ſupplied, or that the title of the plaintiffs may be decreed to be perfected, on ſome of the grounds on which Courts of Equity

exercise their jurisdiction in perfecting conveyances, and supplying defects in titles.

There is a demurrer to this bill, and also to an amended bill stating the payment of the purchase money to have been made to a trustee, named in the act before refered to for want of equity. Which demurrer was allowed by the Chancellor.

At the outset of this business, a most momentous and important enquiry presents itself to us: Namely, whether an act which had received the sanction of the people of Virginia through their Burgesses, which had also been ratified by the royal Council, and was only not approved by the royal Governor, because he had abdicated his government, nor could be carried to our King himself, for his assent, because he had made open war upon us his people, Shall under all the circumstances of the case, be considered as valid, or as entirely null and void?

Finding myself not supported, in my *present impressions*, on this question, by gentlemen whose opinions I respect, I state them with diffidence, but yet as an act of duty, flowing from an high sense of the importance of my present situation, and a correspondent anxiety on my part to act according to the best of my judgment and ability.

I will premise that I am not fond of bringing into the tribunals of justice, political considerations: But sometimes it does happen, that questions of political law do present themselves. On these occasions although I am as much an advocate for settled government as any man, I shall be free to say that in dark and doubtful cases, where principles must be resorted to, it is my wish to be governed by those noble principles which atcheived the revolution; which acknowledged the rights, and the power, of the people; and consider Kings and magistrates as their trustees and servants, and at all times amenable to them, and liable to be cashiered or

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depoſed for miſrule and maladminiſtration: Which admit the right of revolution, although it is conceded that ſuch right ought not, in precedence, to be aſſerted, for light cauſes.

Theſe remarks tend to ſhew that, in times of revolution, thoſe *formulæ* are entirely ſecondary, which are impoſed with a view to ordinary times, and ſettled government; and which do not contemplate, nor are ſuited to, a ſtate of ſociety radically and eſſentially different.

As this cauſe can be decided upon a point leſs momentous, and equally clear, with the one now in queſtion, my intention at preſent is only to reſerve to myſelf liberty to deliberate and decide upon this great queſtion if it ſhould occur hereafter. I ſhall not therefore now inquire what authority is conceded in England to an ordinance, *i*, *e*, a ſtatute which has not the royal aſſent; nor enumerate inſtances, in which, in extraordinary times, the uſual formalities attending the ſummoning a parliament, and the paſſing laws, have from the neceſſity of the caſe been in that country diſpenſed with; nor ſhall I contemplate at preſent, the magnitude of this queſtion, as it reſpects all laws paſſed during a ſtate of *Interregnum*, nor whether the clear, though informal, expreſſion of the public voice, as at the time, is not equivalent in its ſanction, to a poſterior law of recognition, paſſed indeed by a ſettled government, but perhaps liable to moſt of the objections, which apply to retroſpective laws.

Theſe and other great queſtions touching this ſubject, I ſubmit to better conſideration, whenſoever they ſhall become neceſſary to be decided; leſt however, in the diverſity which exiſts, as to all political ſpeculations, I ſhould be ſuppoſed by ſome to utter viſionary ideas, I will beg leave to fortify what is here ſaid by the opinions of a moſt eloquent and enlightened writer; and one who has moſt reſpectfully combated and confuted the ſlaviſh

doctrines of an eminent ſtateſman: A ſtateſman who, inſtead of aſpiring (as he might have done) to a niche in the temple of liberty, has choſen to go down to poſterity penſioned and deſpiſed.

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The writer I mean is M^c^Intoſh, page 60 "They" ſays he, (meaning the ſtates General) "had been "aſſembled as an ordinary legiſlature, under ex- "iſting laws. They were transformed by theſe "events into a national convention, and veſted "with powers to organize a government. It is in "vain that their adverſaries conteſt this aſſertion "by appealing to the deficiencies of forms. It is "in vain to demand the legal inſtrument that "changed their conſtitution, and extended their "powers. Accurate forms in the conveyance of "power, are preſcribed by the wiſdom of law, "in the regular adminiſtration of ſtates. But "great revolutions are too *immense* for *technical* "*formality*. All the ſanction that can be hoped "for, in ſuch events, is the voice of the people, "however informally, or irregularly expreſſed."

I ſhall next conſider upon ordinary grounds, how the title of the plaintiff ſtands as againſt the heirs of the *Feme*, under the deed of the 7th December 1774, ſhe having ſurvived the enactment of the act of 1776, converting eſtates tail into fee ſimple.

I entirely accord in principle with the reaſoning of the Chancellor relative to the power of the wife to bind her eſtate and her heirs, having regard to the intereſt of the huſband, and the idea of coercion by him being removed.

Our law acting upon this principle has eſtabliſhed a ſolemn mean by which a wife may convey, by privy examination entered of record. In this reſpect greater regard is had to the rights of the wife, than in England; for there ſhe cannot reverſe a fine, altho ſhe is not examined by the judge; but

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the conſtruction of the law is only as it were directory to the Judge, that he ſhould not receive the fine without ſuch examination. 1 *Bac.* 496.

The caſe before us too, being that of a ſolemn agreement of record, ſteers clear of thoſe deciſions in which it has been held that the agreement of the wife *in pais* ſhall not bind the huſband.

The act of 1748, p. 143 enacts, "that all deeds and conveyances &c. by huſband and wife, (ſhe being firſt privily examined) ſhall be good and effectual in law, and as valid to convey and paſs over all the eſtate, right, title, intereſt, claim, and demand of the wife, and her heirs, in and to the lands ſo conveyed &c. whether the ſame be in right of dower, or feeſimple, or whatever other eſtate (not being fee tail) ſhe may have therein, as if the ſame had been done by fine and recovery &c."

After this explicit declaration, it is the leaſt to ſay, that the examination here ſtands on as high ground as the fine and recovery in England; and the before mentioned conſideration that ſuch fine may bind her without her examination (which is not the caſe under our act) certainly fortifies that conſtruction.

But further this act follows up, the conſtruction of the ſtatute *de donis*, by making the exception of the eſtate tail, which eſtate ſhall not paſs here, (or there) except according to the terms of the ſtatute, in favour of the heirs in tail.

This act however, according alſo with the Engliſh deciſions in this reſpect, with the ſingle exception of not paſſing the eſtate tail declares all conveyances &c. with ſuch examination &c. *to be good and effectual in law*; i, e, I preſume good and effectual in a ſenſe commenſurate with the terms of the deed.

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Bearing these principles and distinctions in mind, let us advert to some of the English decisions.

In *Wooter* vs *Hile*, 1 *Mod.* 291, it was held that covenant would lie against a wife surviving her husband upon a covenant for quiet enjoyment, in a fine suffered by him and her. This is perhaps a stronger case than ours: for there it does not appear that it was the *wife's* land, which was the subject of the fine. If so, she had no interest in it, and it was solely on her solemn covenant that she was held to be responsible.

In 1 *Bac.* 496, it is said, that husband and wife may join in a fine to convey her inheritance. And 2 *Bac. ab.* 553, an agreement that A. and his heirs should enjoy the entailed lands shall be executed, but the issue is not bound until the fine be levied.

From the foregoing remarks and cases, I think it clearly results, that a deed of a feme covert touching her inheritance, in conjunction with her husband and solemnly acknowledged by her to be her free act, is competent to bind her to the extent thereof, with the exception before stated, relative to passing an estate tail; and that an agreement to pass a fine, or permit an act to pass docking the entail, is always obligatory on the person so agreeing until executed.

In this view, Mrs. Harwood was bound to carry her agreement into execution, until the act of 1776 passed, which vested her with the *feesimple* property. After that æra, a shorter and plainer course presents itself to us, and she and her heirs should be decreed to do that *directly*, which before could only be done circuitously, i, e, to convey the plaintiffs her inheritance.

If it should be said, that this process will injure the heirs in tail, for whose benefit lands were in-

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tended to be settled in lieu, the answer is, that this would have been also, precisely the case by the operation of the act of 1776, if such lands had been so settled, immediately after the agreement, as these by the operation of that act would have been absolutely vested in the mother.

I think that the decree of the Chancellor is erroneous, and that the demurrer ought to have been over-ruled.

FLEMING Judge. The first question is, whether the deed from Harwood and wife was wholly void, or so far only as not to defeat the entail, but good for every other purpose? The 5th sect of the act of 1748 declares that the deed of husband and wife, where she is privily examined, "shall be "good and effectual in law, and shall be as valid "to convey and pass over all the estate, right, "title, interest claim and demand of such wife, and "her heirs, in or to the lands, or tenements, so "granted, or conveyed, whether the same be in "right of dower or feesimple, or whatsoever other "estate, *not being fee tail*, she may have therein, "as if the same had been done by fine and recove-"ry, or by any other ways or means whatsoever:" So that, with the single exception of the *fee tail* which is afterwards provided for in the 14th section, the deed was good for every purpose of conveying the estate and interest, or estopping the right, of the wife and her heirs; who were not at liberty to say that it was void generally, but as to the excepted case only: For a deed may be void as to one purpose, and good as to another.

This leads to the second question, whether Mrs. Harwood was not bound by her covenant to make further assurance; and consequently after she acquired the fee simple, under the act of 1776, to confirm the title, which was to have been conveyed under the deed? Upon this point the reason-

ing of the Chancellor, although not followed up in his decree, is very forcible: His words are, "when huſband and wife, who have all the power "which ſhe had in her ſtate of ſolitude, conſpiring "together in a conveyance of her inheritance, "and obſerving legal forms and ceremonies, agree "to guarantee the title to the purchaſer, the a-"greement is not leſs obligatory on her, than a "like agreement by her, if ſhe had not changed "her ſtate would have been, for his junction with "her in the act, removing the ſingle impediment "to the energies of her power and will, reſtored "to thoſe faculties their priſtine vigour. This "propoſition is believed to be the foundation of "Engliſh judicial deciſions, that a married woman "is obliged by covenants in a fine. The forms "and ceremonies requiſite by law to create this "obligation, in the caſe of a married woman, are "a deed executed and acknowledged, as well by "the huſband, to ſhew his conſent, without which "obligation cannot ariſe, as by the wife and her "declaration upon a privy examination by the "court, that the execution and acknowledgment "of the deed were with her free conſent, which "was indeed eſſentially neceſſary; but which was "only neceſſary to make the covenants in which "ſhe joined with her huſband, as much her acts as "if ſhe had executed the deed whilſt ſhe was un-"married." This clearly evinces the obligation which the wife, by her covenant, came under to confirm the title of the purchaſer, and make him complete owner of the eſtate as ſoon as ſhe was enabled to do it. She was bound to have aided the application to the Legiſlature for a ſpecial act to dock the entail: And conſequently, after the general law upon that ſubject had unfettered the eſtate, and made her proprietor of the feeſimple, ſhe was bound to convey that alſo, to the purchaſer.

But this not having been done in her lifetime, a third queſtion ariſes, namely, whether her re-

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presentatives are bound to do it? It is objected that they are not, because no equivalent in value was settled on, or received by them. But that is not important; 1. Because the equivalent would have been turned into a feesimple, which the husband and wife might have conveyed away from the issue; 2. Because the act of 1776 has destroyed the interest of the issue altogether, and therefore every argument predicated upon a supposition of their rights, entirely fails.

It follows that the wife being bound by the covenant to make further assurance, the plaintiffs were right in coming into a court of equity to ask a specific performance of it; and consequently that the decree ought to be reversed, and the plaintiffs allowed to compel a conveyance and complete their title.

CARRINGTON Judge. A great deal of the matter stated in the bill might have been omitted, as the private act of Assembly had nothing to do with the cause; for, not having been perfected, it was never a law.

The case then depends upon the deed; and the question is, whether that, on account of the coverture of the wife, was wholly void; or so far only, as respected the estate tail?

The covenant of the wife to make further assurance was obligatory on her in consequence of the privy examination; for that was equal to a fine and recovery; which it is admitted on all sides makes the covenants of a feme covert binding on her. *Plowd.* 57, 82. 1 *Bac. ab.* 496. 1 *Mod.* 291. Therefore when she acquired the feesimple in 1778, she was under an obligation to convey it to the purchaser: For the act of 1748 merely excepts the entail, and declares that the deed shall be valid as to convey every other interest of the wife, *old edit. laws* 143: So that as to every legitimate

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purpose the deed was effectual. But the sale was lawful; because the deed, not affecting the entail, only passed the life estate of the grantors, which they might convey without violating any law; and therefore she was bound to complete the title of the purchaser as soon as she had capacity: For it is like the case of *Thornton* vs *Corbin**, in this court the other day; in which it was held that a covenant to convey as soon as the party should recover the estate, was obligatory.

But the rights of the issue are urged: That argument, however, has no weight with me; because they have none; the act of 1776 having entirely defeated them: So that the completion of the contract will not put them in a worse situation with respect to the right in tail, than they would be without. But be that as it may, they are legally bound by the covenant of their mother, sanctioned, as it has been, by the privy examination; of course they are under the same obligation to convey that she was. And upon the whole, I am for reversing the decree, overruling the demurrer, and sending the cause back in order that the defendants may be compelled to answer the bill.

LYONS Judge. A court of equity, in decreeing a specific performance, is constantly regulated by three great principles; namely, 1. That the contract is to be judged of as matters stood at the time of entering into it: 2. That the court will not alter or extend the agreement of the parties: And 3. That equity will not decree a performance when the consideration for it fails.

These principles apply, strictly, to the case before the court. For when the present contract was entered into, the entail could not have been dockt but by an act of Assembly, which was never made without an equivalent estate was settled to the same uses. A circumstance of considerable importance in the present case; because being an

* *Ante.* 384.

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expreſs declaration of a general ſtatute, the wife is preſumed to have known it, and acted under the impreſſion. In fact, it appears that ſhe did know it, and claimed the benefit of the rule of law; ſince ſhe joined in the petition to the Legiſlature for an act to enable her to convey upon the uſual terms: Which proves that ſhe neither did, or, perhaps, would have conſented on any other. The caſe therefore is within the influence of all the principles; for, conſidering the contract as matters ſtood at the time, it is manifeſt that a decree for a performance, under the preſent circumſtances, would be to alter the agreement of the parties, and to extend it beyond what was originally contemplated, without the intended compenſation.

The argument drawn from the covenant and privy examination of the wife carries no conviction to my mind: For the general words in the act of Aſſembly are to be underſtood of ſuch conveyances as the feme might lawfully make; and the covenants, being neceſſarily confined to the eſtate conveyed, could only extend to ſuch acts as ſhe might lawfully perform: Which in this caſe was merely to paſs the intereſt for her own life, and to petition the Legiſlature to enable her to convey the entail. The perſonal covenant therefore if obligatory at all, which is doubtful, ought to be confined to theſe two objects; becauſe, at that time, ſhe could not, by her own act, defeat the entail, and every attempt to do ſo, being contrary to the ſtatute, was illegal and void. Therefore her covenant ought, at moſt, to be underſtood to mean that ſhe would aſſure further, when an act, ſettling an equivalent eſtate, ſhould paſs: For that was a probable event, but it was not foreſeen, that a general law, like that of 1776, would be enacted; and therefore neither party can reaſonably be ſuppoſed to have contemplated ſuch a thing.

It is ſaid that the privy examination is declared by the act of Aſſembly to be equal to a fine and re-

covery in England; and therefore that the covenant, in the preſent caſe, will operate as extenſively as thoſe under that ſpecies of conveyance there. This conſequence is not quite evident, however: For the act of 1748 only ſays that the deed ſhall paſs the eſtate of the wife as effectually as if a fine and recovery had been ſuffered, and not that the wifes perſonal covenants ſhall bind her; Of courſe the inference is not altogether clear. However, let it be otherwiſe; and ſtill it will not help the appellants caſe; becauſe, as before obſerved the covenants, running with the land, have a neceſſary reference to the eſtate, for the wifes life, actually conveyed; and therefore will not extend to future intereſts. Beſides, a recovery ſuffered againſt tenant in tail only conveys the eſtate of which he is actually ſeized at the time, and can lawfully convey in that manner, 2 *Black. com.* 359. *Bro. ab. Tail* 32; therefore the example is not ſo appoſite as it might, at firſt ſight, appear.

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But leaving the legal diſcuſſion, and returning to the court of equity. We have already ſeen that that court never decrees a ſpecific performance where the conſideration has failed. Now that, in the preſent caſe, was the equivalent eſtate; which not having been ſettled, the conſideration fails; and, therefore, no decree for a ſpecific performance ought to be made. This, however, is not all: For it is a rule, that no act of tenant in tail ſhall be carried further in equity, than at law. 1 *Fonbl.* 290. If then the law would not permit her to defeat the iſſue, without an equivalent; and would conſider any covenants for that purpoſe void, ought a court of equity to go further, and inforce them? To have created even a ſemblace of equity, Mr. Nelſon ſhould, either out of his own money, or the damages recovered in a ſuit againſt the huſband (whoſe eſtate was firſt liable, 1 *Wms.* 264, 2 *Vern.* 689) have purchaſed an equivalent eſtate, and ſettled it, or

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offered to have ſettled it, on the wife and iſſue, upon receiving a title to that which was entailed.

It was argued that the iſſue were not worſe off, than they would have been without the covenant; becauſe the act of 1776 would have turned the entail into a fee, and conſequently their rights would have been equally defeated; But the obvious anſwer is, that their being better, or worſe off, does not legalize the tranſaction, if it was unlawful at the time. However, the truth is, that they would have been in a better ſituation without the covenant; becauſe the fee would have been in the wife, who, purſuing her former notion, would, probably, not have conveyed it without an equivalent; ſo that the eſtate itſelf, or the equivalent, would have deſcended to them at her death.

Upon the whole, I am of opinion that the wife was not bound in law, or conſcience, to confirm the title, when ſhe acquired the fee in 1776, without an equivalent ſettlement as was intended at the time of the contract, and, conſequently that the appellants have no equity: Of courſe I think the Court of Chancery did right in diſmiſſing the bill, and that the decree ought to be affirmed.

PENDLETON Preſident. The firſt queſtion is whether the conveyance of Harwood and his wife to Nelſon, is *wholly* void as to both by the 14th ſection of the land law of 1748, or whether it is only ſo far void as it tends to defeat the eſtate tail, but good for every other purpoſe? The words of the clauſe are, that all fines and recoveries, and all other acts and things done for the purpoſe of docking, cutting off, or defeating an eſtate tail, ſhall be void. From which it is obvious that the preſervation of the eſtate tail was the object of the Legiſlature, and ſo far as the deed tended to defeat that eſtate it is declared void.

But ſurely if a tenant in tail takes upon himſelf to ſell and convey the land in fee, with a general

warranty, altho it will not deprive the iſſue, or a remainder man, of the land, yet it will not only paſs the eſtate for life of the tenant conveying, but will ſubject him to make ſatisfaction to the purchaſer for the full value of the land, if recovered by the iſſue; and this ſeems to be the ſettled conſtruction of the ſtatute de donis, which has a like clauſe declaring conveyances made by tenants in tail, to be void.

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Suppoſe a man tenant in tail, with the reverſion or remainder in fee in himſelf if he dies without iſſue, makes a conveyance in fee, and afterwards dies without iſſue, the conveyance ſo far from being void, paſſes an abſolute eſtate to the purchaſer as derived out of both eſtates of the vendor. Upon this point therefore I am of opinion that Harwood the huſband is bound by all the covenants in this deed.

We then come to conſider the caſe of the wife, under the 5th ſection of the ſame law, on a fair conſtruction of which it will read thus; the conveyance of huſband and wife provided ſhe be privily examined ſhall be good and effectual in law, as if made by fine and recovery, and then the clauſe declares the effect of the conveyance that it ſhall paſs all her intereſt whether dower fee ſimple, or other eſtate not being an eſtate tail. This exception has the ſame object as the other clauſe to preſerve eſtates tail and not further to interfere with the deed. That a feme covert is bound by her covenants in a fine and recovery is incontrovertibly proved by the ſeveral authorities, and that an action of covenant may be maintained againſt her for the breach of any of them. And this is fully illuſtrated and the reaſon of it fully explained by the Chancellor ſhewing that the deed of a feme covert is not made void for want of judgment to protect her intereſt, as in the caſe of an infant, but for want of freedom of will to exerciſe her judgment, from the ſuppoſed power of the huſband, which being removed by the privy examination, her deeds are as binding upon her as if ſhe was a feme ſole. And having by the deed bound her heirs alſo, when ſhe acquired

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feeſimple by the act of 1776, ſhe was, and her heirs are, bound by law and in conſcience to convey that fee to Nelſon, in conſequence of the covenant to make further aſſurance, and this ſuit is proper in equity for a ſpecific performance of that covenant. This I ſay was ſo fully ſtated in the decree, that I wondered to ſee the Chancellor diverted from overruling the demurrer upon the circumſtances ſtated in the decree reſpecting a ſettlement, ſuppoſed to be intended, upon the wife and her iſſue. For how does that matter ſtand; The bond recites that Harwood and his wife had agreed to dock the entail, and convey the land to Nelſon in fee, and, as ſoon as might be, procure an act of Aſſembly to that purpoſe.

In the caſe of *Baker* vs *Child*, 2 *Vernon* 61, it is ſaid that where a feme covert, by agreement made with her huſband, is to ſurrender or levy a fine, though the huſband die before it be done the court will by decree compel the woman to perform the agreement. This caſe has, I believe, been ſince overruled, I am ſure it ought to be, ſince her agreement wants that ſanction which gives it validity, her privy examination, to manifeſt her freedom of will. But in the preſent caſe that agreement being connected with her conveyance, to which ſhe was examined, it ſeems to remove the objection. And we are to enquire how it ſtands under the agreement as to the ſettlement.

With that ſettlement it appears to me that Nelſon had nothing to do. The vendors were to procure an act to dock the entail, and were to comply with ſuch terms as the Legiſlature ſhould require. At that time an act could not be procured without a ſettlement, and Harwood and his wife by the acts which paſſed the two houſes in 1774 and 1775, propoſed ſatisfactory ſettlements, tho' what they were do not appear.

So far then it appears that Harwood and his wife made fair and honeſt attempts to perform their en-

gagement, in which they were disappointed by accidents, in which no fault could be imputed to them; but the obligation continued upon them to renew the application to the Assembly at their next session, which session was that of October 1776, when the revolution produced a change in the system, and rendered it unnecessary for them to propose a settlement, since a general law passed, which vested a feesimple in Mrs. Harwood, without substituting any settlement. Having thus acquired a power to perform her covenant, she was, as before observed, bound by law and in conscience to confirm Nelson's title: and her heirs, since if they claim the land it must not be as issue in tail, but as heirs in feesimple, are under the same obligation. And it has not been improperly observed, by one of the judges, that a man conveying, or covenanting to convey, lands to which he has no title at the time, but afterwards acquires one, is bound in equity to perform his covenants. It is unnecessary to consider any other points in the cause, since a majority of the court concuring in my opinion, the decree is to be reversed with costs, the demurrer overruled, with such costs as were occasioned thereby, and the defendants to answer the bill of the complainants.

Nelson, *vs.* Harwood.

BARNET,

against

DARNIELLE.

A magistrates attachment against an absconding debtor can only issue from the county where he resided, or is actually found, at the time of issuing it.

THOMAS BARNET obtained an attachment from a magistrate of Frederick county against the estate of Darnielle as an absconding debtor. The warrant is as follows: "Whereas Thomas Barnet, "of the City of Richmond, hath this day complain-"ed before me, Robert Macky, one of the Common-"wealths Justices for the said county, that Isaac Dar-"nielle, *late of the City of Richmond*, is indebted "to him the sum of £130, current money of Virgi-

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"nia, and that the said Isaac Darneille hath privately removed himself out of the said City of Richmond, and county of Henrico, or so absconds that the ordinary process of law cannot be served upon him, These are therefore &c."

The county court gave judgment for the plaintiff, & the defendant obtained a writ of supersedeas thereto from the District Court; where the judgment was reversed, the court being of opinion, *that the attachment ought to have issued from the county of Henrico.* From which judgment of reversal Barnet appealed to this court.

RANDOLPH for the appellant; It is not necessary, that the attachment should issue from the county in which the debtor resided. The law provides for two cases; that is to say, the one for small debts in which the attachment is to go from the county of his residence, the other for larger demands, in which cases the law plainly gives jurisdiction to the justices, of any county where the debtor's property is found.

WICKHAM *contra.* According to that construction the law would become an instrument of oppression. The act speaks expressly of *the county*, meaning the debtors residence, and never could be intended to embrace a case like this, where the debtor was a resident of Henrico, and the attachment was issued in Frederick, where it does not appear the debtor ever was.

RANDOLPH in reply. Whenever the debtor absconds and conceals himself, that circumstance alone gives jurisdiction to the justices of any county where his property may be found; which is proved by the words, to attach the effects *wherever to be found*; as only the magistrates of the county, where the goods are, can issue the attachment. For the absconding and concealing himself is the evil, and the summary process of the attachment is to secure the effects before they can be secreted and carried off. Nor

is there any inconvenience in this; becauſe, if in truth he were not abſconding and concealing himſelf, he might prove it at the trial.

Barnet, *vs.* Darnielle.

Cur adv. vult.

ROANE Judge. There is nothing in the complaint ſtated in the attachment in this caſe ſhewing that Darnielle is *removing* out of, or even through, the county of Frederick, that he abſconds in that county, nor is there even an allegation that he was ever in that county. The moſt that is ſaid is, that he hath removed from Henrico, or ſo abſconds that proceſs cannot be ſerved &c. This removal from Henrico does not neceſſarily imply a removal into, or through Frederick; and the abſconding upon record may relate to the county of Henrico, or if repelled as if relative to that county by the deſcription *I. Darnielle late of the county of Henrico*, yet in that caſe it only relates to ſome county other than Henrico, and does not neceſſarily relate to Frederick. Admitting then for the preſent, which however is not neceſſarily to be now decided, that an attachment could legally iſſue from Frederick againſt the defendant moving through that county, or there abſconding having left his late reſidence in another county, yet, in that view, this attachment is inſufficient, as the complainant does not ſtate either of thoſe caſes. Upon the caſe before us, a Juſtice of any county, where effects may be found, can as well grant an attachment as a Juſtice of Frederick. Although ſufficient facts may exiſt, in the view of the law now ſuppoſed, to ſuſtain the attachment, yet they do not appear; and the maxim *de non apparentibus, et de non exiſtentibus eadem eſt lex* holds *a fortiori* in a caſe of ſummary proceedings.

I think therefore that the judgment of the Diſtrict Court is correct.

FLEMING Judge. The act of Aſſembly, being an innovation upon the common law, is to be conſtru-

Barnet, vs Darnielle.

ed ſtrictly; of courſe unleſs the plaintiff can bring himſelf within the words, or the obvious intention of the Legiſlature, he has no claim to redreſs by this mode of proceeding. The warrant of attachment does not ſtate the defendant to be removing from, or abſconding in, the county of Frederick; but deſcribing him as *late of the City of Richmond*, ſays, that he has privately removed from the latter place, or ſo abſconds, that the ordinary proceſs of law cannot be ſerved upon him, without alledging where he abſconds; ſo that it does not appear that he ever was within the juriſdiction of the county court of Frederick. But the law does not authoriſe a magiſtrate of one county to iſſue an attachment againſt a debtor abſconding from another; for it evidently contemplates his removal, or abſconding, from the place of his reſidence. It is ſaid, however, to be the practice to iſſue attachments in this manner. In anſwer to which I obſerve, in the firſt place, that I am not ſatisfied that the practice is ſo: But if I were, ſtill that could not juſtify an abuſe of the law; which plainly limits it to the place of reſidence. I am therefore for affirming the judgment of the Diſtrict Court.

CARRINGTON Judge. The attachment is a violent remedy, given againſt men in diſtreſs, and who have generally no friend to bail them, or means of defending themſelves. Hence no proceſs is more ſubject to abuſe; and therefore humanity, as well as policy, dictates, that the law ſhould be ſtrictly purſued in obtaining it; and that the plaintiff ſhould not be allowed, by means of it, to oppreſs an unfortunate, or unprotected adverſary. In the preſent caſe, the attachment is not ſupported by the ſtatute: It ſtates that Darnielle had privately removed himſelf from the City of Richmond, without ſhewing that he had ever been a reſident of Frederick; or that he was there abſconding, and concealing himſelf, or had even paſſed through that county: Of courſe, if he was ſubject to the attachment at all, it ought to have iſſued from Richmond or Henrico, and not from Frederick;

because there is nothing stated in the proceedings to give jurisdiction to the court of the latter county. I think therefore that the judgment of the District Court ought to be affirmed.

Barnet, vs. Darnielle.

LYONS Judge. Concurred that the judgment of the District Court should be affirmed.

STEVER,
against
GILLIS.

JOHN STEVER entered a caveat against a patent for 184 acres of land, on Loonings creek, in Botetourt county, surveyed for Gillis the 16th of May 1797.

G. in 1770 surveyed and took a patent for a tract of 160 acres of land, the lines of which were all surveyed except two, which were the lines of A. H. under a former patent, and which formed a small angle containing 26 acres. The two lines in the survey and patent of G. were thus described, "Thence along Andrew Henrys line 188 poles to the begining."

This survey and patent are good; and entitled G. to a pre-emption in the 26 acres,

The jury find that the caveator made an entry of 26 acres in September 1794; and obtained a patent for it in 1796. That Gillis's original survey of 160 acres (whereon his patent issued) was made the 16th May 1770. That one of the lines was not run by the surveyor; and that one of the angles is not laid down in the plat: That the 26 acres are within the bounds of Gillis's said patent for 160 acres, dated June 20th 1772, provided the expression in the patent will warrant Gillis in passing Henry's line. *That Gillis made an entry for 50 acres June 14th 1789, (which covers the said 26 acres claimed by Stever;)* and, in pursuance of an order of Botetourt court, resurveyed his lands, including therein his old patent of 160 acres, and 26 acres part of an entry for 50 acres, which 26 acres he claimed as surplus lands, within the bounds of his old patent. *But they do not*

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find that Gillis entered for 50 *acres June* 14*th* 1789 *as above mentioned.*

The District Court gave judgment in favour of Gillis, and Stever appealed to this Court.

WICKHAM for the appellant. The last line in Gillis's patent was a straight one; and therefore did not comprehend the land in connroversy: For the length of the two lines upon Henry's tract is greater than a straight line. Besides the courses are different. A general reference to Henry's lines was uncertain, and therefore objectionable, upon a supposition that a straight line was to be run. But it is clear that Gillis meant a straight line at the time of his survey, because it answered his purpose better.

CALL *contra.* Gillis's patent was founded on an actual survey, except as to the last line, which is only refered to. But that was enough; because it had been surveyed before, when Henry's survey was made; So that the course was completely ascertained, and might be known by recurrence to the surveyors books. It was therefore unnecessary to run it, as a general reference was sufficient. Supposing then that the reference had been to Henry's lines, there could have been no difficulty; for it would be evident that both were comprehended. But the omission of a single letter at the end of the word will never be held sufficient to defeat the justice of the case. On the contrary, the court will supply the omission: Especially as it is obvious that the word ought to have been *lines*, or the figure never could have been completed; because one line only would not have proceeded along Henry's line, but would have lead another course altogether. Nor is there any reason to suppose that Gillis meant a straight line. Indeed a contrary intention is obvious. For it is clear, from the whole view of the figure, that he meant to comprehend all the vacant land in those parts up

to Henry's lines, which he intended to make his boundaries: An intention which there was nothing to impede; for, at that time, no previous warrant from government was neceſſary, as there is now; but the party made his entry and ſurvey without; and, upon exhibiting them at the public office, claimed the patent, on payment of the compoſition. Of courſe, there is no reaſon to conclude, that he was obſtructed in his views from the want of money, or a larger warrant; becauſe he might have taken leiſure to procure the neceſſary ſums. The reference to Henry's lines was not uncertain; for they might have been aſcertained by record: And that is certain, which may be rendered ſo. The only objection therefore ſeems to reſolve itſelf into the length of the line; for the two lines united are about 143 yards longer than the ſtraight line. But that circumſtance will make no difference; 1. Becauſe the whole of thoſe two lines was to be gone over; for the patent ſays they are to go along Henry's line to the *Beginning*; So that they muſt get to the beginning; and therefore the miſtake is only a miſtake of calculation, or of meaſure; neither of which ought to vitiate. 2. Becauſe the locator was not privy to it, but depended on the public officer, whom the law obliged him to employ; and therefore it would be unreaſonable, if he was to be affected by the officers acts, as he had no choice. 3. Becauſe the act of Aſſembly declares ſuch acts ſhall not prejudice; for it expreſſly ſaves the right of pre-emption, where a miſtake has been committed either through the *ignorance*, *miſtake*, or *fraud* of the ſurveyor, *Rev. cod.* 156, § 46. But one of theſe it muſt have been; and which ever it was, the act provides for it. Under this act the plaintiff ought to have given notice to the defendant of the ſurplus, and ſhould have obtained a warrant to ſurvey from the regiſter; which he was bound to have waited a year for, in order to have given the defendant an opportunity of aſſerting his rights of preemption. But nothing of all this appears. On the contrary

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the plaintiff has hurried on, without the leaſt regard to the law. Nor is this all; for, by the act, the defendant had a right to have aſſigned the ſurplus in any part of the tract: Whereas the plaintiff arbitrarily claims a particular ſpot. Again the defendant had a right to reſurvey; and, for that purpoſe, obtained an order from the county court, which he carried into effect, and returned the plat to the regiſters office, but was improperly arreſted in his progreſs to a patent. In this reſpect too the proviſions of the law were violated by the plaintiff; and therefore upon that ground, alſo, the law is for the defendant.

WICKHAM in reply. The queſtion ariſes on the laſt line, which ought to have been a ſtraight, and not a crooked line. It was not run; and that proves that a ſtraight line was meant at the time. For the uſual courſe is to omit to run the laſt line, which can be done as well by platting, as by actual ſurvey. So that the inference is inevitable, that a ſtraight line only was intended: A ſtraight line leads, as neceſſarily, to the beginning, as the courſe along the other two: So that there is no objection upon the ſuppoſed ground that the figure would not have been cloſed, according to that idea. There was no miſtake of the ſurveyor in the manner contended for on the other ſide: but the preſumption is that the ſurvey was made in purſuance of the directions of Gillis; who acquieſced therein, and therefore adopted the act. Gillis could not take more than his patent lines covered: The reſt was neceſſarily vacant land, and not affected by the patent. The act of Aſſembly, cited for the appellant, makes no difference; becauſe this land was not comprehended within the boundaries of Gillis's patent; and therefore the doctrine concerning pre-emption does not apply. The ſurveyor did not, neceſſarily, know the courſes of Henry's lines; and therefore he could not mean to rely on them. He thought Henry's line a ſtraight one; and therefore did not run it, but pro-

tracted the ſtraight line as Henry's; which anſwers the objection that the patent calls for Henry's line.

Stevers, *vs.* Gillis.

Cur. adv. vult.

LYONS Judge delivered the reſolution of the court. That there was no error in the judgment of the Diſtrict Court, and therefore that it was to be affirmed: He added, that *ſpeaking for himſelf only*, he ſaw no foundation for the appeal. That a ſingle letter at the end of a word was omitted in the ſurvey and patent, which ought not to affect the caſe; becauſe it could make no difference, in ſubſtance, whether *line* or *lines* was uſed; for ſtill the ſame courſe was intended, and neceſſarily to be purſued, in order to complete the figure.—Conſequently that he concurred with the reſt of the court that the judgment ought to be affirmed.

Judgment affirmed.

STUART,

againſt

LEE, GOVENOR, &c.

If an act of Aſſembly directs that a bond ſhall be payable to the juſtices, and that the penalty ſhall be £ 1000. If the bond be taken payable to the Governor, and the penalty be £ 10,000; and a ſuit thereon is brought by a ſucceeding Governor for the benefit of a party injured, it cannot be ſuſtained.

THIS ſuit was brought in the name of Lee as Governor and ſucceſſor of B. Randolph, who was ſucceſſor of E. Randolph, againſt Ward, Steward, Renick, Anderſon, Clendeneon, Reid, Banks and Johnſton, upon a bond given by Ward as ſheriff on the 26th of April 1787, in the penalty of £ 10,000; and conditioned for the faithful performance of the duties of his office. The declaration was in the form of a declaration upon a common bond for payment of money: The writ being executed on Steuart, Renick, Anderſon, Reid and Johnſton only, they plead conditions performed; and the plaintiff for the benefit of Burnſides aſſigned a breach in Ward's ſuffering a priſoner committed to his cuſtody, by the county court,

Stewart, vs. Lee, Gov'r.

at the suit of the said Burnsides, to escape. The defendants traversed the escape—Issue—The jury found that the escape was through negligence, and assessed the plaintiffs damages to £173 2 9. The defendants moved to arrest the judgment, because an action of debt does not lie against a sheriff for an escape on mesne or other process, either at common law, or by statute; but the District Court decided for the plaintiff: And thereupon the defendants obtained a writ of *supersedeas* from this court.

Wickham for the appellant. The suit could only be maintained under the act of Assembly, and therefore the bond and proceedings must be conformable thereto, or they are void. But the act of 1755, *ch.* 2, declares that the bond should be made payable to the King, *old body laws* 325, 6: And, by the act of convention, all bonds formerly made to the king, should now be made payable to the justices of the county. Of course it does not pursue the law. Besides the penalty of the bond is for £10,000, whereas the law only prescribed £1000: Which charges the securities further than the law intended; as writs of scire facias may be sued until the penalty is exhausted. It is not a voluntary bond; for the law compels the sheriff to give bond: So that it is not an act *in pais*; but done under the authority of the law, which therefore ought to have been pursued. But the other objection is equally fatal; for it ought to have been made payable to the justices, and not to the governor.

Bennet Taylor *contra*. The justice of the case is certainly with the appellee; and the decisions of this court support him in his claim. 1 *Wash* 367, 1 *Call* 41, 249. Which cases shew that although the bond is not agreeable to the statute, yet it is good at common law. The same argument applies to the present case. For although the bond does not pursue the statute, yet,

as there is nothing in it repugnant to the rules of law, it will be good at common law. Besides the court might add to the judgment that future writs of *scire facivs* should not be issued beyond £1000, and thus obviate the argument with regard to the sureties being further charged than the act prescribed. In *Branch* vs *the Commonwealth*, 2 *Call*, the point concerning the bond's being made payable to the govenor occurred, but was not decided. However there appears to be no cause of objection upon that ground, after the decisions already refered to.

WICKHAM in reply. The court cannot apportion the penalty according to what is contended for on the other side; for the sum is certain, and judgment must be entered for it. The cases cited do not apply. That of *Scott* vs *Hornsby*, 1 *Call* 41,* was a case which depended upon calculation only; and therefore has no resemblance to the present, which is bottomed upon an act of Assembly; and that ought to have been pursued. A similar answer may be given to *Hewet* vs *Chamberlayne*, 2 *Wash.* 367; for there a particular penalty and certain obligees, were not prescribed, as there are in the present case.

Cur. adv. vult.

ROANE Judge. I am of opinion that the judgment ought to be reversed for the reasons assigned by the appellants counsel. As this action is by the successor of the govenor for the benefit of persons injured, it is to be brought under the act of Assembly; and the only question is, whether it is sustainable under it or not? It is not: By the then law the bond should have been given to the justices: A £1000, also, is stated in the act as an essential part of the *condition;* and therefore not to be varied from.

* N B. Judge Roane asked the reporter if the words *or misapprehension of the law* in his opinion page 43, were not mistaken? Saying that he meant to decide upon the right to resort to the execution for the calculation.

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FLEMING Judge. The bond is not taken as the act of Assembly directs; for, by that, it should have been made payable to the justices, and the penalty should have been £1000, only. The suit is brought upon it, however, as a bond taken under the act; and therefore the action not sustainable. I am consequently of opinion that the judgment ought to be reversed.

LYONS Judge. The court are unanimously of opinion, that the judgment is to be reversed; and the entry is to be as follows:

"The court is of opinion that the said judgment is erroneous in this, that as the bond in the declaration mentioned, on which the suit is brought in the name of the said Henry Lee esq. govenor of the Commonwealth of Virginia, as successor to Beverly Randolph &c. as above mentioned, was not taken pursuant to law, or the act of Assembly in such case made and provided, no action can be had or maintained thereon by the said Henry Lee esq. in his character of governor or successor in office, only; therefore it is considered that the same be reversed, and that the defendants recover their costs against the defendant Burnside."

GOOSELY,

against

HOLMES, Ad'mr of Elliott.

A venire facias de novo awarded, because the verdict was uncertain, as to the quantity of assets in the defendants hands.

GOOSELY sued a *scire facias* against Holmes as administrator of Elliot, upon a judgment obtained against Elliott, in his lifetime; the defendant plead that he had fully administered by discharging certain judgments (*setting them forth*) obtained against Elliott himself, and by payment of public taxes. Replication that the defendant

had not fully administered; nor paid the judgment stated in his plea; and that he had goods and chattels, at the time of the institution of the suit, sufficient to pay the plaintiffs debt; which he prayed might be enquired of by the country &c. But no *similiter* is entered. The jury found a verdict in these words. "We of the jury find for the plaintiff £124 14 6¼:" But the entry thereof in the order book is thus; "and thereupon came a jury "&c. who upon their oaths do say, that the defendant hath not fully administered all and singular the goods, chattles and credits, which "were of the said William Elliot at the time of "his death, and that assets to the amount of "£124 14 6¼ were in the defendants hands, at "the time of issuing the writ of *scire facias* aforesaid, as the plaintiff by replying hath alledged." The Hustings Court gave judgment for the plaintiff; to which judgment the District Court granted a writ of superiedeas, and reversed it, with an order for a new trial in the Hustings Court. At a subsequent trial in the latter court, the jury found a verdict in these words, "We of the jury "find for the plaintiff according to the former "judgment, and that the defendant had at the "time of the service of the *scire facias* in this case, "and prior to the first day of August 1793, assets "in his hands to the value of £124 14 6¼, and "we also find for the plaintiff £70 4 1½, with interest from the 24th of September 1791, subject "to the opinion of the court upon this point, "Whether an administrator can pay off a debt due "by judgment against his intestate, on which said "judgment an execution had issued after a *scire* "*facias*, made known to him to revive a judgment "obtained against his intestate in his life." The Hustings Court now gave judgment for the plaintiff, for the £70 4 1½: To which last mentioned judgment, another writ of superfedeas was awarded by the District Court. Where the same was reversed; and thereupon Goosely appealed to this court.

Goosely, *vs.* Holmes.

Gooſely, *vs.* Holmes Adm.

WICKHAM for the appellant. The plea to the *scire facias* is fully adminiſtered except certain aſſets; and the ſingle point was whether he had aſſets or not? To which the verdict of the jury is clearly reſponſive; becauſe they find a particular ſum, which muſt relate to the aſſets, as it would have been unneceſſary to have ſpecified the ſum, upon any other ground. The verdict ought to be refered to the ſubject matter in diſpute; which, in this caſe, was only as to the amount of the unadminiſtered aſſets; for there was no plea of payment, which might have varied the caſe. The verdict ſubmits a ſingle point only to the court; but the jury meant to decide all other points fully, and therefore the *quantum* of aſſets, neceſſarily.

The plaintiff by ſuing out a *scire facias* obtained a preference, 11 *Vin. ab.* 301. For the word *proceſs*, there, muſt refer to the *scire facias;* becauſe there could have been no other proceſs, until the judgment was revived, as an execution could not have been taken out, before. The ſame doctrine is laid down in *Fonbl. eq.* 406, and in *Richardsons, Wills* 380: Which is analagous to the legal doctrines in other caſes; for the law always gives a preference to ſuperior diligence. 2 *Dougl.* 452. The Diſtrict Court erred therefore; and their judgment ought to be reverſed.

NICHOLAS *contra.* The *scire facias* did not give a preference; for the executor might pay any other judgment, notwithſtanding, 3 *Bac.* 80. *Cro. Eliz.* 575, *Allen* 48, 4 *Mod.* 296. The 11 *Vin.* 301, cited on the other ſide, is actually in our favour; becauſe it proves that the executor may pay either judgment at any time before execution; which is ſupported by *Wentworths office of executors 8th edit.* 197; where it is ſaid that if *scire facias's* are iſſued on both, he may confeſs judgment to one, and prefer it to the other. The paſſage cited from *Fonbl.* 406, is not againſt us; for the author means, that he, who firſt ſues execution,

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ſhall obtain a preference; and the reaſon is, that the execution binds the property: All which is proved by the caſe refered to, by him, in 1 *Lord Raym.* 251. Diligence is not the rule, as the counſel on the other ſide inſiſts, but dignity; for where the dignity is equal, the executor may prefer which he pleaſes. 3 *Bac. ab.* 81, 82. The caſe of bonds does not apply; for that turns upon the notice, which can only be given by ſuit: Whereas, in the caſe of judgments, he has notice without. The verdict ſuppoſes an execution, which might have been ſerved after the death of the teſtator; and therefore bound the property, 2 *Bac ab.* 716, *Comberb* 33, 2 *Ventr.* 218, 1 *Salk:* 322, 1 *Mod.* 188, *Skin.* 257, 258, 12 *Mod.* 5, *Gilbs exns.* 15, 10 *Virn.* 568. If it be doubtful when it iſſued, that will be a ground for a *venire facias de novo*, 1 *Wash* 282. But the fair inference from the finding, is, that it iſſued in the lifetime of the teſtator.

WICKHAM in reply. There are two queſtions, 1. Whether an executor can pay after a *ſcire facias* iſſued? 2. Whether the mere emanation of the writ in the teſtators lifetime gives a preference? As to the firſt: The caſes cited on the other ſide are like the caſe of bonds, where payment cannot be made to another bond, not in ſuit, after an action commenced. Of courſe, the rule will ſtill hold, that the *ſcire facias* gives a preference, unleſs a *ſcire facias* had been iſſued on the other judgment, and judgment confeſſed thereto. As to which, the caſe, in 11 *Vin.* 301, is concluſive. The execution, there ſpoken of, muſt mean an execution founded on a *ſcire facias;* for no other could iſſue, after the death of the teſtator. Indeed the *ſcire facias* itſelf is an execution; for it is a writ to ſhew cauſe why execution ſhould not iſſue; that is, it is ſuing for execution. *Rich. Wills* 380 is expreſs to that effect; and ſo is *Fonbl.* 406. The paſſage, from *Wentworth*, does not oppoſe the doctrine, but is conſiſtent with it.

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The forms of pleading prove my poſition. The plea is, that at the time of inſtituting the ſuit, he had not aſſets; and the verdict is, that he had them to a certain amount; which ſhews that a payment, afterwards, will not avail, becauſe it is inconſiſtent with the plea itſelf. The deciſions are all according to the doctrine contended for by me; and that is a ſufficient argument, whether the rule is reaſonable, or not. If there be two bonds, and ſuit is brought on one, the executor cannot pay the other, withiout a ſuit and judgment. Notice is not the reaſon of this, but diligence, and the prior ſuit. The court will never preſume that the defendant confeſſes judgment improperly; and, therefore, if the judgment is in fact obtained, that is ſufficient; but it is otherwiſe, if no ſuch judgment is rendered. This right of preference in the executor is ſubject to great abuſe; and therefore not to be extended further, than the law has already ſettled. As to the ſecond queſtion: The verdict is certain enough. It ſtates that an execution iſſued; and the omiſſion to ſay, whether it was delivered to the ſheriff, or not, does not prejudice the caſe; becauſe the firſt fact of the emanation is certain, and there is no room to infer that it was delivered, as nothing is ſaid about it; for it was not neceſſary to negative it. Pocket executions are uſual; and therefore, if there was a delivery, it ſhould have been ſhewn. The ſimple enquiry was, whether the defendant had aſſets when the *ſcire facias* iſſued? And therefore the ſubſequent payment was irrelevant. The determinations, relative to the delivery of the execution binding the property, do not apply, as the verdict does not preſent the fact to the court. The object of the lien is to prevent alienations before the execution is levied; but this only applies to tangible objects, and not to *choſes* in action: Beſides it muſt be delivered to the ſheriff; for a pocket execution has no effect. Of courſe, no lien attaches, until ſeizure of the property; but when ſeized, then it relates to the *Teſte*, as to the executor

and, as to the others, to the time of delivery. If, however, the writ runs out of date, before the property is taken, the lien expires; for it is the seizure alone that can preserve it. The plaintiff only claims the smaller sum found; and therefore, if it is uncertain which of the two was meant as the quantity of assets in the executors hands, there is no ground for a *venire de novo;* because it was one, or the other of them; and when the plaintiff asks the lesser sum only, no possible injury can be produced: which renders the verdict certain enough.

Cur. adv. vult.

ROANE Judge. The first judgment rendered in the Court of Hustings in this cause, was, that the plaintiff recover £ 124 14 6½.

As this judgment is reversed, and I think rightly, by the District Court, it is no further material to be considered, at present, than as it is refered to in the special verdict rendered on the second trial.

That verdict finds for the plaintiff, "according to the former judgment," i, e, *as it might be supposed*, that the plaintiff should recover the sum awarded him by that judgment, viz. £ 124 14 6; but the jury go on to find for the plaintiff £70 4 1½ with interest from the 24th of September 1791, subject to the opinion of the court, upon the point, "whether an administrator can pay off a "debt due by judgment against his intestate, on "which said judgment and execution had issued af-"ter a *scire facias* made known to him, to revive a "judgment obtained against his intestate in his life?"

This latter sum is that for which the Hustings Court entered judgment; and I understood Mr. Wickham, as according with the court in interpreting the meaning of the jury to be, that this sum was that to be recovered by the plaintiff.

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Notwithstanding this admission of the appellant's counsel (if I understood him correctly) of his understanding the finding to relate to the smaller sum, but which admission I presume he did not mean should bind his client, the latter part of the verdict is in hostility with the former, in respect to the sum to be recovered, and the meaning of the jury, as to this essential fact, cannot be clearly ascertained.

My own construction of this verdict would rather have been, that the jury, by the first part of the verdict, found (by reference) the £124 *due to the plaintiff;* that they then gave a reason for this finding, by stating that the administrator had assets at the time of issuing the *scire facias* to the amount of £124; and that they found a further sum of £70 4 1½, subject to the question submitted.

But however the true construction of the verdict may be, it is evident, that a considerable uncertainty exists in this respect, which could not be aided by any opinion the court might form upon the point submitted. The court could never render any judgment upon this verdict, without the danger of mistaking the meaning of the jury, as to the amount of the sum, by them, considered to be due.

This is a strong case therefore for a *venire de novo*; which ought to have been awarded by the District Court, instead of giving final judgment for the appellee.

FLEMING Judge. The verdict is too uncertain to enable the court to form a satisfactory opinion upon it; and therefore I think a *venire facias de novo* must be awarded.

CARRINGTON Judge. The verdict does not even shew when the execution issued; and, in short, it is so uncertain, as to all the material points, that there is no way of doing justice between the parties, but by awarding a *venire facias de novo*.

LYONS Judge concurred.

Venire facias de novo awarded.

COHOONS,
against
PURDIE,

PURDIE, as executor of Purdie, brought debt againſt the Cohoons, as heirs of Cohoon, upon a bond given by the anceſtor. Pleas, 1. Payment. 2, That the defendant had no aſſets by deſcent, nor had at the time the writ iſſued, nor at any time ſince, except a tract of 107 acres of land. The plaintiffs took iſſue on the plea of payment; and as to the ſecond plea, relpied, that the defendants had ſufficient other lands by deſcent, from the anceſtor. On which replication the defendants took iſſue.—The jury found a verdict for the plaintiff for the debt in the declaration mentioned, and one penny damages. The Diſtrict Court gave judgment for the plaintiff; and to that judgment the defendants obtained a writ of ſuperſedeas from this court.

If in a ſuit againſt an heir at law he plead aſſets, without ſetting them forth in certain, and the plea is found againſt him, the plaintiff will have judgment.

BENNET TAYLOR. The great error is, that the jury did not inquire of the value of the lands according to the directions of the act of Aſſembly, *Rev. code* 54; for the verdict only finds the debt, and not the value; which is a fatal objection, as the act is poſitive, that the value ſhall be inquired into: And there is the ſame reaſon for it on the plea of *nothing by deſcent*, as in caſe of judgment by *nil dicet;* in which latter caſe it will be admitted that it ought to be done.

WICKHAM *contra.* The objection is not material: For, by the deciſions in England, the common law rule gave the plaintiff a right to judgment where the plea was found againſt him. 14 *Vin ab.* 241. To remedy which the act was made, requiring the defendant to ſet forth the aſſets in certain.

But here the defendant does not deny aſſets altogther; he admits ſome without ſetting forth the

Cohoons, vs. Purdie.

value; so that the defendant does not bring himself within the act, which relates to pleas of *rien per descent*, only. Of course, it depends upon the rule of the common law: which gives a peremptory judgment, on account of the false pleadings. The verdict is for the debt in the declaration mentioned; which implies assets of value sufficient to satisfy the demand; and, therefore it may be extended into form, so as to conform to, and fulfil the object of the pleadings. 1 *Call*, 246.

B. TAYLOR in reply. The act makes a distinction between a plea confessing the action, but not the assets; and a plea confessing the assets, but not the value: In the first case, the judgment is peremptory against the person, but not in the latter. The court could not extend the verdict in the way contended for; because the judgment is different, according to the nature of the plea; which giving the character of the case, the court ought not to distort the verdict, against the nature and tenor of the pleadings.

Cur adv. vult.

LYONS Judge. Delivered the resolution of the court, that there was no errer in the judgment of the District Court, and therefore that it was to be affirmed. He added that, *speaking for himself only*, he thought that the plea having been found to be false, a peremptory judgment against the defendant followed of course. That the act of Assembly was a copy of the statute of the 3 & 4, *W. & M. ch.* 14; which allows the plaintiff, on a plea of *Riens per descent*, to reply, that the defendant had lands from his ancestor before the original writ brought, or bill filed; and, if found for the plaintiff, the jury are to inquire into the value of the lands so descended; and, thereupon, the court is to give judgment for the value. But that the plaintiff here has not, as impowered by the statute, replied that the defendant had lands *before*

the original writ was ſued, but that he had other lands by deſcent, ſufficient to pay the debt. In which caſe the jury need not ſet out the value of the lands deſcended, but it is enough for them to find that the lands came, by *deſcent*, ſufficient to anſwer the debt and damages. Nor is there any hardſhip in all this: For the heir, if he really has aſſets, ſhould diſcloſe them, at once, and ſet forth their value: He ought not to plead a plea, at the common law, falſe in itſelf, and then endeavour to protect himſelf under the ſtatute. For that gives him a double defence, under the ſame plea; one at the common law, the other under the ſtatute.

Cchoons, *vs.* Purdie.

Judgment affirmed.

BRACHAN, *againſt* GRIFFIN.

GRIFFIN brought a bill in Chancery againſt Willis and Brachan, to be relieved from an agreement entered into, March 27th 1780; whereby Willis was to pay the plaintiff £15000 on the 4th of May following, and to give his bond for payment of £10000, on the 4th of May 1781: In conſequence of which the plaintiff was to give Willis his bond for £2500 ſpecie, payable on the 4th of May 1790; and, if he failed to make the payment of the £15000, on the appointed day, the plaintiff was to be at liberty to declare the contract void. The bill alledges that the plaintiff gave his bond for the £2500; but that Willis never paid the £15000, or gave his bond for the £10,000: Notwithſtanding which he had aſſigned the plaintiff's bond to Brachan, who had inſtituted a ſuit upon it at common law; and therefore

A agreed, in conſideration of £2500 paper money to be paid him by B, in the years 1780, and 1781, to pay the latter, £2500 ſpecie in 1790. The contract was obligatory.

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the bill prayed an injunction. The anſwer of Willis ſtates that he paid £8000 of the £5000 to the plaintiffs order, and the other £7000 to the plaintiff himſelf; who firſt agreed to take Mayo's, but afterwards actually accepted Dixon's, bond for the £10000. The anſwer of Brachan ſays that the aſſignment was for a valuable conſideration; and that the plaintiff made no objection to the bond for ſeveral years.

The Court of Chancery, being of opinion, that the plaintiff was only liable for the value of the £10000 in May 1781, diſſolved the injunction as to that value with intereſt, and made it perpetual as to the reſidue. From which decree Brachan appealed to this court.

WICKHAM for the appellant. There is a difference between a man's coming into a court of equity as a defendant or a plaintiff, when the object is to ſet aſide, or enforce an agreement. For the court will refuſe to ſet aſide a contract, when it would not decree a ſpecific performance. Brachan has obtained a judgment at law, and therefore his right muſt prevail, unleſs the plaintiff in chancery proves a ſuperior equity. There is nothing in the caſe which tends to ſhew, that the parties did not contract on equal terms. Willis is a defendant in equity, and aſks nothing: Therefore the plaintiff muſt prove a better title, or he cannot ſucceed, *Cowp* 790. No inequality of ſituation in the parties has ever been inſiſted on; and of courſe there is no cauſe to impeach the contract upon that ground. There was no inequality of price; but if there was, that would not be ſufficient to ſet aſide the contract, 2 *Atk* 251, *Fonbl.* 116; for, if an agreement is fair, at firſt, equity will not ſet it aſide, upon the happening of any future event. 1 *Bro.* 156. Both parties are to be put on the ſame ſituation, as if the contract had been fulfilled. The bill charges that the £15000 was not received; but the anſwer, which is reſpon-

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five, expreſſly alledges that it was; and the receipt is ref. .d to. Griffin was not to execute his bond for the £2500, until the £10,000 was paid; and therefore the preſumption is, that it was paid, as the bond for £2500 was actually given. The anſwer muſt either be taken to be true, or not reſorted to at all. Brachan is an aſſignee without notice of any equity, if there was any; and he was ſuffered to retain it for ten years, without any information relative to it. Willis's letter concerning the aſſignment muſt relate to that, which was made to Brachan. Griffin comes into equity to ſet aſide the contract; and therefore he is not entitled to relief further than the terms of the agreement; that is to ſay, to ſet of the value of the £10000 againſt the £2500 bond.

RANDOLPH *contra*. The contract was not fulfilled by Willis himſelf; and therefore he has no right to inſiſt upon performance, on the other ſide. It makes no difference that Griffin is plaintiff; becauſe he had no other redreſs. Nothing ever was paid for the £2500; and therefore Brachan cannot be entitled to it. The giving the bond is no proof of it; for the articles of agreement required the bond to be given in May 1780, and the £10000 was not to be paid until May 1781. Added to which, it is unqueſtionably true, that there is no evidence that the £10,000 was ever paid. Mayo's bond was never agreed to be taken; and Dixon's tender does not eſtabliſh it. The money never was tendered; but if it was, it was not done in time; nor the money kept; ſo that Willis ſuſtained no injury. The contract was in fact, a wagering bargain. It makes no difference that Brachan is an aſſignee; for he took the bond ſubject to all equity againſt it. Willis's letter to Griffin proves nothing; for Griffin was not bound to communicate with Brachan, until the latter applied to him, upon the ſubject. The guarded anſwer of Brachan leads to a ſuſpicion that he was acquainted with the circumſtances of

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of the caſe; eſpecially, as it appears that he had an indemnity.

WICKHAM in reply. Griffin got what he bargained for; and therefore cannot complain. The object of the plaintiff is to diſſolve the contract, merely, on the ground of its being a bad bargain, in event. Griffin agreed to take the money in Dixon's hands; and he tendered it. Of courſe, it was Griffins own fault if it was not paid. If paper money had appreciated, Griffin would have had the benefit, and conſequently there is no hardſhip in obliging him to ſtand by the depreciation. The ſilence of Griffin for ſo long a time after the aſſignment to Brachan amounts to a concealment, which operates to his own prejudice, and not to that of Brachan. The anſwer of Brachan contains nothing, which leads to the ſuſpicion contended for, upon the other ſide. The indemnity makes no diffirence: for that was only to guard againſt a failure in circumſtances, and not of obligation.

Cur adv. vult.

ROANE Judge. This was a contract between Griffin and Willis, whereby the former agreed to give his bond for £2500 ſpecie, payable at a diſtant day; on conſideration whereof the latter agreed to pay him £15000 paper money, on or before the 4th of May 1780, and give his bond for the further ſum of £10,000, payable on or before the 4th of May 1781; with a proviſo that the former might declare the bargain void or not if the latter failed in payment on the 4th of May 1780.

The firſt ſum was paid by Willis ſhortly after the day; the acceptance whereof by Griffin is deemed a renunciation of of his power to revoke reſerved by the appellee.

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As between Griffin and willis, in the event which has happened of the abolition of the paper currency, the general ſcale would have been reſorted to as at the time of the contract for the aſcertainment of the value of the paper money, had not an agreed rate of depreciation been in the contemplation of the parties. That rate as evinced by the contract itſelf, and the teſtimony, was ten for one. Willis then would have been liable to Griffin, under the deciſions of this court, for the very ſum in ſpecie (as the agreed value of the paper at the time,) which his aſſignee is now claiming from Griffin upon his bond.

Where then is the inequality of this contract? But the matter did not reſt here. Willis ſubſtituted a bond of Dixon for the £10,000; for which he paid the money, and which terminated the buſineſs between him and Griffin, by conſent of the latter.

If that bond has been paid off to him, in paper or in ſpecie, according to the legal ſcale, (the agreed one being relinquiſhed by him by the effect of that tranſaction) it is nothing to Willis or his aſſignee, the former having complied with the agreement on his part.

There is then certainly no inequality or iniquiquity in the tranſaction, which ſhould affect Brachan the aſſignee for valuable conſideration, and without notice of any objection.

I think therefore that the injunction ought to be diſſolved.

FLEMING Judge. The contract in this caſe was founded upon ſpeculation on both ſides. Griffin thought the preſent uſe of the money would be advantageous to him; and Willis that it would be more beneficial to receive the ſpecie at a diſtant day. The contract ſeems to have been fully un-

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derſtood by the parties, and to have been fairly entered into upon both ſides. In its origin, then, there was no objection to it; and the only queſtion is, whether it has been performed. The bill ſtates that the £15000 were not paid; nor the bond given for the £10,000; although the plaintiff executed his bond for the £2500 ſpecie. To ſay nothing of the improbability of a mans giving his bond without the equivalent, the bill is expreſſly contradicted by the anſwer and ſeveral documents in the cauſe; which prove a ſubſtantial fulfilment upon the part of Willis; who therefore was entitled to demand performance from the other party, however unfavourable the contract may have eventually proved to Griffin: Of courſe, Brachan, who now repreſents him, has the ſame right to the ſpecie; and therefore there is not the ſlighteſt ground for the injunction, which ought to be wholly diſſolved, and the bill diſmiſſed.

CARRINGTON Judge. This was a mere ſpeculation upon the paper currency of the country. Griffin attached a value to the preſent uſe of a conſiderable ſum of it: Willis calculated that it would be better to part with it, and receive ſpecie for it at a more diſtant period. Both of them acted fairly in making the contract, and there is nothing to taint or impeach it, if it has been complied with by Willis. The bill alledges that he did not comply; but the anſwer contradicts it; and that receives conſiderable ſupport from the documents in the cauſe: Which taken together very clearly eſtabliſh that the contract has been ſubſtantially performed, on the part of Willis; and, conſequently, no reaſon can be adduced, why Griffin ſhould not be held to a fulfilment upon his part alſo. I am therefore of opinion, that the decree ought to be reverſed, and the bill diſmiſſed.

LYONS Judge. The caſe appears to me to be a very plain one againſt Griffin, who entered into a fair contract, which has been ſubſtantially fulfil-

ed by the other party; and consequently he can have no pretext for not performing it himself. I concur therefore that the decree ought to be reversed, and the bill dismissed.

MOSBY,

against

LEEDS.

Distress for rent cannot be made off the demised premises; & therefore an attachment served upon property found off the premises, was prefered to it.

LEEDS filed a bill in Chancery stating, that Clark being indebted to him, absconded, and the plaintiff took out an attachment against his effects; which was levied by Mosby the sergeant, on a female slave, and some other articles. That Marshall, or Anderson, having a claim against Clark for house rent, directed the sergeant, on the succeeding day, to distrain, who appears to have levied it on the balance of the negro, which should remain after satisfying the plaintiff; who was first entitled, as the negro was not taken on the demised premises; but the Hustings Court postponed him to the claim for rent. That, at the sale under the judgment of the Hustings, the plaintiff bought the said slave, and the sergeant some time after brought suit, and recovered judgment against him, for the purchase money. The bill therefore prays an injunction.

The answer of the sergeant states, that when he distrained the slave, she was not upon the demised premises, but she had belonged there, until Clark absconded. That some objection being made to the attachment bond, Leeds agreed with Marshall that the latter should be prefered. That the plaintiff bought the slave at the sale, and promised to pay the purchase money to the defendant for the use of Marshall.

The Court of Chancery granted a perpetual injunction. And Mosby appealed to this court.

Mosby, vs Leeds.

RANDOLPH for the appellants. The first question is, Whether the slave taken off the premises, could be attached without payment of the rent? The second is, Whether the agreement, between Marshall and Mosby, is not binding? A third question may be as to the jurisdiction of the Court of Chancery? Upon which it is to be observed that it was a legal question, decided by a court of law, and then brought into equity. Which regularly could not be done: And the failure to plead it ought not to prejudice the defence, as the act of Assembly could never be intended to extend so far. But, upon the first question, it is clear for the appellant. The literal expression is not to be regarded, but the reason of the law is to be attended to. For the accidental absence from the premises ought not to affect the landlords right, as she was still appurtenant to the habitation of the tenant. There was an *animus revertendi*, and, from the nature of the property, she was subject to *loco motion*; which could not be restrained in the ordinary course of affairs. Besides the bond ought not to have been made payable to the magistrate; but to the defendant in the attachment.

COPLAND *contra*. The act of Assembly is decisive, that no property, but that actually on the premises, is protected, *Rev. cod.* 162; and, here, the slave was not upon the premises. She would not therefore have been distrained by the landlord; and if she could not be distrained, the landlord surely is not entitled to prior payment; because it is only in respect of his right to destrain, that he is entitled to preference. The bond was not void; because, although payable to the magistrate, it was for the benefit of the defendant in the attachment. There was no consideration for the agreement of Marshall, to give it the effect contended for.

RANDOLPH in reply. The accidental abſence of the ſlave could make no difference; for, in conſtruction of law, ſhe ſtill belonged to the premiſes, like a villian appurtenant at common law; who is ſtill appurtenant although he may happen to be out of the manor. The bond ought not to have been made payable to the magiſtrate; for that does not ſatisfy the law; which requires it to be made payable to the party. Mosby vs Leeds.

Cur. adv. vult.

ROANE Judge. The preſent appellee had obtained an attachment againſt the goods of Clark, an abſconding debtor: It had been levied by the appellant, the ſergeant of the City of Richmond, on divers goods of Clark, including a negro woman named Fanny. The next day an account for rent was put into his hands to diſtrain for by William Marſhall, and the ſame officer returned, that he conſidered this diſtreſs levied upon the ſame property: There was alſo an attachment in favour of Gallego; which he alſo conſidered as the third levied upon this property.

When the appellees attachment came on to be tried, it was about to be conteſted by William Marſhall on the ground of the ſuperior dignity of his claim, and of ſome alledged defect in the bond or attachment. This intention being known to the appellee, he, of his own motion applied to Marſhall to deſiſt therefrom, and a compromiſe then took place; according to which the judgment was rendered. That compromiſe was, that Marſhalls claim ſhould be firſt paid, and the appellee come in for the reſidue. This compromiſe admits, as between the now parties, the legality of the claim for rent, and the liability of the goods to ſatisfy the ſame. The judgment of the Huſtings Court is in favour of the appellee for his debt; orders a ſale of the attached effects; but directs a poſtponement of the appellees claim to that of

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Marshall. It is now a question whether this judgment, as between the now parties, is not valid? I consider it not as relating to Gallego, or any others, than the parties before us.

In general cases the judgment of the court of law would have ended with the order for sale of the attached effects: But here was a dispute concerning the property. The parties had a right to interplead for the purpose of settling the right. The compromise exhibits the event of such interpleader; and the direction of the court respecting the application of the proceeds is certainly justified by the agreement of the parties. I consider that part of the judgment which directs the application (in connexion with the testimony in this cause) as a memorandum of the agreement between the parties to that effect. It cannot be doubted, that the appellant was competent to make such an agreement. A party litigant in a court of justice may yeild every thing to his adversary: It is a sufficient consideration that he puts an end to the lawsuit. But here, by this compromise, he probably expedited his recovery. As to the slave Fanny, he only yeilded what Marshall might probably have established his right to, by further and other testimony; and he had liberty to come in upon the surplus; a fund which he then probably thought amply sufficient to satisfy his claim: If he is disappointed in the event, it is not a reason to set aside the compromise.

This view of the case equally holds, whether the proceedings in the attachment were regular and legal, or not. The judgment given by the Hustings Court is in force and unreversed. It is not for us, (as a court of equity,) to correct, or reverse, that judgment; but, if it were, the bond stated by the clerk to have been filed in the attachment, seems unobjectionable; and this outweighs the loose testimony relating to an alledged defect originally existing therein.

Mosby, &c. Leeds.

There is some ambiguity, whether the slave Fanny was sold to pay the appellees debt, or the rent. That however is immaterial, as both those claims coalesced in the judgment; and under that judgment the sale was made.

This judgment then, upon an interpleader between the now parties, upon a compromise relating to the disposition of the attached effects, fully settles the question relative to the slave Fanny. As to her (as well as the other effects) the appellee has renounced the claim he now sets up. The question of law, at present stirred, has been settled by the agreement of the parties; and the judgment of the Hustings Court established upon the best of all foundations. The agreement of the parties must not, as between them, be disturbed. If that question of the law was not open, however it might be in the extreme case put by Mr. Randolph, I should probably be of opinion, that there are no *data* in this case, in relation to the place or circumstances of seizure, to authorise us to depart from the imperious words of the statute.

I am of opinion, that the decree ought to be reversed, and the injunction dissolved.

FLEMING Judge. The controversy in this case has arisen from the sergeants having neglected to mention, in his return to the attachment, that the negro was taken off the demised premisses; for, if that had been stated, the law would have considered that the distress for the rent could only have been made upon the premisses, and consequently that the attachment was to be prefered. This then appearing in the court of equity, the preference must prevail, unless the agreement with Marshall alters the case. It does not, however; 1. Because there was no consideration: For the alledged defect in the attachment bond is not proved; and, if it was, still it appears to me that such a bond, made payable to the magistrate who took it, might be sustained, as the magistrate would be a trustee for the debtor. 2. Because Gal-

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lego's assent was as necessary as that of Leeds, because that also must have been considered as executed upon property found off the premises; and therefore not liable to be distrained: So that either way Marshall was not entitled; and of course the agreement, being altogether without consideration, is not binding on him, especially as it is not entered of record. If the landlord attempts to avail himself of the priority allowed by the statute, he must bring himself strictly within the terms of it. For he has no equity over any other creditor, independant of the act of Assembly. Upon the whole I am for affirming the decree.

CARRINGTON Judge. The whole nature of the transactions being discloſed by the proceedings in equity, and it clearly appearing that the slave was taken off the demised premisses, the first question that occurs is, Whether she could be distrained for rent, unless actually found upon the leased lands? And the law is clear that she could not; for distress can only be made upon the demised premisses, and not elsewhere. The privelege is local, and does not extend to any other place; whereas the attachment may be executed on the property if found any where within the county. The next question then is, Whether the compromise between Leeds and Marshall affects the case? And I think it does not. 1. Because Gallego was not consulted; and even he had a better right than Marshall. 2. Because the alledged defect in the attachment bond is not proved. The agreement was therefore totally without considertaion: And, consequently void. The objection to the jurisdiction of the Court of Chancery cannot be supported. Because the truth of the case was not before the court of law; and the essential fact, that the slave was taken off the premisses, never was discloſed, until it appeared in the Chancery proceedings. Of course I think the decree ought to be affirmed.

LYONS Judge. The slave was not upon the premisses, at the time when the attachment was served; and therefore was not liable to be distrained for

the rent; for diſtreſs can only be made upon the land. This is proved by the 9th ſection of the act; which gives the landlord power to ſeize the tenants property carried off the premiſes, within ten days after the removal. A proviſion which would have been entirely uſeleſs, if he could have diſtrained. Mosby, ſa Leeds.

It was ſaid, however, that it will be hard upon the landlord, if he is to loſe his remedy, merely becauſe the property happens to be off the land at the time the diſtreſs is to be made. But the anſwer is, that he has the ſame remedies in that caſe that other citizens have; and, in addition thereto, he has the power of ſeizure within the ten days; and may moreover diſtrain the property of other people found upon the premiſſes: Advantages, which abundantly compenſate the ſuppoſed hardſhip.

It being clear, then, that the ſlave could not have been diſtrained as ſhe was not found upon the premiſſes, the priority of Leeds, whoſe attachment had been legally ſerved, could not have been diſputed, (for the pretence that the bond was inſufficient has no weight, as no defect is ſhewn;) and therefore he was, really, intitled to have had the property ſold to ſatisfy his claim, unleſs the agreement with Marſhall altered the caſe.

But I do not think that that circumſtance affects him. 1. Becauſe the ſheriff had not returned the nature of the caſe, ſo that Leeds was ignorant of the ſtate of facts; and therefore contracted under a deluſion. 2. Becauſe there was no conſideration for the agreement; for, as Marſhall could have taken no ſteps which would have diſappointed the attachment, he gave up nothing; and Leeds, on the other hand, received no benefit, by the tranſaction. It was therefore a bargain without conſideration, and conſequently not obligatory on Leeds; who having a complete right, could not loſe it, without ſome conſideration.

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It was said, however, that it was a question of law, and therefore that the Court of Chancery had no jurisdiction. But that is not correct; for, as already observed, the sergeant having neglected to return the truth of the case, the facts were unknown to Leeds at the time of the trial at law; and therefore he could not have availed himself of them there: Which was a sufficient foundation for his coming into equity. I concur, therefore, that the decree should be affirmed.

YOUNG,

against

GREGORY.

In an action for a malicious prosecution, the declaration must aver the want of *probable cause*.

YOUNG brought suit in the Borough court of Norfolk, against Maitland and Gregory, for levying an attachment on his property in France without cause, the plaintiffs and defendant being all inhabitants of this country. The declaration is, "for that the said defendants, at Dunkirk which is "within the jurisdiction of the court of the Borough "aforesaid, did, maliciously, and *without any legal* "*or justifiable cause*, attach or arrest, or cause to be "attached or arrested, fifty hogsheads of tobacco, or "the proceeds thereof, the property of the plaintiff, "and the same so attached, or arrested, did detain or "cause to be detained; wherefore he saith that he is "injured, and hath sustained damage to the amount "of two thousand pounds; wherefore he brings suit "&c."——Plea *not guilty*, and issue,

The plaintiffs upon the trial did not produce any copy of the attachment and proceedings under it, but offered depositions and letters to prove it. Which the court allowing to go in evidence to the jury, the defendants filed a bill of exceptions to their opinion. Verdict and judgment for the plaintiff. The defen-

dants appealed to the District Court; where the judgment was reversed; because the "Borough Court "gave it as their opinion, that the evidence, in the "bill of exceptions mentioned, was proper to go to "the jury; whereas, it was improper being hearsay "evidence, except what was derived from the appel-"lants own letter; and because the attachment in the "proceedings mentioned, or an authenticated copy "thereof, was the best evidence, and ought to have "been produced." To which judgment of reversal, Young obtained a writ of supersedeas from this court.

Young, vs Gregory.

WICKHAM for the appellant. The question was whether the evidence was proper for the jury or not? Two objections may perhaps be raised, 1. That the record spoken of was not produced. 2. That letters from the plaintiff and others were offered to the jury.

The copy of the record was not necessary, as it was a thing spoken of, and admitted, on both sides. Independant of that circumstance, however, it does not appear, that it was a matter of record. For all countries have not courts of record; and there was no proof made of any such, in the present case. But if there was, yet, as it happened in a foreign country, the plaintiff was at liberty to prove it by other means. *Dougl* 1. A judgment of a foreign court has no higher dignity than a debt by simple contract. And it would be very inconvenient, if the plaintiff must, in all cases, produce the records of a foreign country, as it, frequently, might not be possible for him to procure copies, from a variety of causes over which he could have no controul. For instance, the garnishee might refuse to inform him of the court in which the proceedings were instituted, or the country might be in such a situation, from revolution or otherwise, that it would not be possible to obtain them. The matter of the suit was certainly actionable; for, although done in a foreign country, the slander necessarily spread itself, which is a proper foundation of an action, *Shwartz* vs *Thomas*, 2 *Wash.*

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167. The letters were proper evidence, as leading to the introduction of this teſtimony, and tending to ſhew its effect abroad.

HAY *contra.* The declaration does not ſtate poſitively, whether the defendants arreſted the tobacco, or the proceeds, but merely that he did one, or the other. Neither does it ſtate, that the defendant took the property by legal proceſs; of courſe it was only treſpaſs; and therefore treſpaſs, and not caſe, was the proper action. The words are *attached*, or *arreſted* the property: Which latter word *arreſt*, when applied to the perſon, may be without proceſs; and therefore, when applied to property, may be the ſame, although the word *attach*, might mean more. The declaration, as before obſerved, does not ſtate preciſely what was done, which is a great defect; for it ought to have been preciſe, in order that the defendant might know the exact charge meant to be urged againſt him. It was important to ſay, whether the attachment was of the tobacco, or its proceeds; for the firſt might have been more injurious than the latter. However let theſe points be as they may, ſtill no cauſe of action is ſhewn; for it is not ſtated that the attachment was at an end: But there could be no cauſe of action, until the event of that proceeding was known. *Hob.* 267, 2 *Term rep.* 231, 2 *Eſp.* 527, *Dougl.* 215, *Salk.* 15. Beſides the declaration does not aver the want of *probable cauſe*, without which there could be no action for a malicious proſecution, *Ellis* vs *Tilghman*, (*Ante* 3;) Improper evidence was admitted upon the trial of the cauſe. In the firſt place parol evidence of the attachment was received; whereas a copy of the record ought to have been produced; as all civilized nations grant them. And the act of Aſſembly ſuppoſes it, *Rev. Cod.* 160. But there is another objection to the evidence; namely, that the plaintiff was allowed to read his own letters to the jury; and it is not important, whether they were pertinent to the matter in diſpute, or not; for ſtill they ought not to have been read. 2 *Wash.* 281; But this is not

all; for a letter from Gregory and ſon was allowed to go in evidence to the jury, although it does not appear, by the record, that there was any connexion or agency to juſtify it. Young, vs. Gregory,

WICKHAM in reply. Caſe was the proper action; for it appears that the ſeizure of the goods was by legal proceſs. The word *attachment* neceſſarily implies it; and *arrest* may ſignify the ſame thing: It is like the ordinary phraſe of the *arrest of a ſhip;* which is introduced into all policies of inſurance. Beſides it is a legal word, appropriated to legal proceedings; and is not uſed in any other way, unleſs it be figuratively. The diſtinction, contended for, is not ſuſtainable; for *prima facie* the common meaning will prevail; that is to ſay, the word will be taken to mean, that it was done by legal proceſs. It is immaterial, however, whether it be ſo or not; for the charge in the declaration will ſuit either action, and therefore the want of form will be cured by the act of jeofail.

The declaration is certain enough; for it comprehends an actual ſeizure of our property, whether thatproperty, at the time, conſiſted in the tobacco, or its proceeds. The court will preſume, after a verdict, that evidence was given to the jury, that the ſuit was ended; and then the act of jeofails will cure the ſuppoſed want of the allegation. There is no proof of the exiſtence of a record of the attachment; and therefore it was not incumbent on the plaintiff to produce a copy of it. The introduction of the plaintiffs letters was not improper. It is frequently done in mercantile cauſes; & it was neceſſary in order to ſhew that the plaintiff had drawn on Dunkirk for the money, and was diſappointed: Which proves, that the letter from Gregory and his ſon was alſo neceſſary, in order to ſhew that they refuſed to pay, when called upon to do ſo. As to the caſe of *Ellis* vs *Tilghman* it was not like this: For the words uſed, there,

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were *just cause;* which might be true, and the party not to blame either, as he might have had a *probable cause.* But the words, here, are *justifiable cause:* Which are sufficient; for it implies *probable cause;* since there could be no *justifiable cause*, without a *probable cause.* The one necessarily involves the other.

HAY. The action should have been trespass; and, if so, there is nothing in the declaration which will make it trespass instead of case. *Contra pacem & vi et armis* may be omitted; but, in other respects, it must have the character of trespass. If it be doubtful whether it be case or trespass, that alone is fatal, *Dougl.* 674. The want of *probable cause* should have been stated in the declaration; and it is not supplied by the words *justifiable cause.* For *justifiable* means the same thing with *legal*, and amounts to a plea in bar. 3 *Black. com.* 306, 4 *Black. com.* 178, *Law grammar* 356. But it is admitted that the want of *legal cause* is not sufficient; therefore neither will *justifiable cause. Probable cause* is ground for a suit of malicious prosecution. 2 *Term. rep.* 231, 1 *Wils.* 233, 2 *Wils.* 307, 4 *Burr.* 1974. Of course those words must be inserted in the declaration, or else there is no cause of action. And the verdict will not cure the want of them, *Dougl.* 683, 2 *Wash.* 187.

WICKHAM. If the declaration alledges a direct injury it is trespass; if consequential it is case. The present is of the latter kind: For it is plainly inferable that the injury was done through the intervention of the officers of justice. The attachment operated either on the effects, or on its proceeds; with this distinction only, that it does not hinder the sale, but merely prevents the paying over the proceeds. It is not like the case of *Ellis* vs *Tilghman*, which only had the words *just cause.* But here the words are *justifiable cause;* which are equal to *probable cause:* And it is not necessary to insert the very words *probable cause;* for

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any which are tantamount will do as well: It was impoſſible to have ſuſtained the ſuit, without ſhewing, on the trial, that the attachment was at an end; and therefore the omiſſion. to inſert that fact in the declaration, is cured by the verdict. The caſes cited on the other ſide are not important. That from *Hob.* was decided before the ſtatute of jeofails was made. That from *Salk.* is a looſe note of a *dictum* of Lord Holt, not entitled to much reſpect. And thoſe from *Dougl.* and 2 *Term rep.* were upon demurrers. But, independant of this, there are expreſs authorities to ſhew; that it is cured by the verdict. 2 *Vin.* 30, 35, 10 *Mod.* 145, 210, *Esp. n. pr.* 279, 280.

Cur. adv. vult.

ROANE Judge. In this caſe I am compelled to yield my impreſſions, relative to the real juſtice of the appellants cauſe, to the eſtabliſhed principles of the law, as ſettled by ſucceſſive and long exiſting deciſions.

It is an action on the case for maliciouſly and without a *juſtifiable cauſe*, arreſting or attaching the plaintiffs goods at Dunkirk in France.

Tribunals of juſtice being inſtituted for the convenience and benefit of the people, it is a *claim of right* to proſecute a civil action, or proceeding; whatſoever the ultimate deciſion on it may be. It then only becomes culpable and actionable, when the party has inſtituted ſuch proceedings from a corrupt motive, and without any ground or cauſe therefor.

Such is the general principle.

The deciſions upon this principle have ſettled the law to be that there muſt be an averment in the declaration of both malice, and the want of probable cauſe. Without the firſt, the motive is

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not corrupt however miſtaken the party ſuing may be: And where there is a probable cauſe for ſuing, the ingredient of malice cannot convert the act of ſuing into a culpable offence.

There is no poſition of the law more ſettled than this; and the exiſtence of the one, and the want of the other, muſt be expreſſly avered, or ſupplied by *equipollent* expreſſions. The word *juſtifiable*, is not ſynonymous with *probable*. The latter refers to a ſtandard within the reach of the perſon at the time, and determining the purity of his motives. The former refers to another criterion within his reach, and carrying with it no certain *datum*, from which we can decide upon the corcuptneſs or purity of the motive.

I quote no particular caſes juſtifying this reſult; but it has not been delivered without an attention to them.

The want of a ſtatement, in the declaration, that the civil proceeding *was terminated*, is cured by the verdict: but the averment of the want of *probable cauſe* is of the very *gist* of the action, and the omiſſion of it muſt overthrow the plaintiffs declaration.

I therefore concur in opinion with the Diſtrict Court, but upon a different ground. The evidence by them ſuppoſed to be *hearſay*, is clearly admiſſible and relevant. But I give no opinion, whether we ſhould preſume the attachment to have been in a court of record? Or upon the neceſſity of producing a record ſhewing its termination.

I think the judgment ought to be affirmed.

FLEMING Judge. The judgment of the Borough Court is, certainly, erroneous, but for a reaſon different from that aſſigned by the Diſtrict Court; becauſe I think the evidence was admiſſi-

ble, as it related to proceedings in a foreign country; which, often times, can be proved in no other way, than by depoſitions and teſtimony *de bors* the proceedings; of which it is not always in the power of the party to procure copies. The real ground of error is, the want of an averment in the declaration that there was no *probable cauſe* for the attachment; without which the plaintiff could have no cauſe of action, 1 *Term rep.* 544; becauſe a man is not liable to be ſued for a malicious proſecution, unleſs the plaintiff ſhews that there was no probable ground for inſtituting the proceſs. *Probable cauſe* therefore is the very git of the action; and, being abſolutely neceſſary to ſuſtain the ſuit, it muſt be avered. The words, *juſtifiable cauſe*, do not ſupply the omiſſion; becauſe there may not be a juſtifiable cauſe, and yet there may be a probable one; which muſt depend upon the complexion of things at the time the proſecution was commenced. Conſequently, I am of opinion that the Diſtrict Court did right in reverſing the judgment, but the plaintiff ſhould be allowed to amend his declaration.

CARRINGTON Judge. I think the evidence was admiſſible, to ſhew the injury which the plaintiff had ſuſtained, and that the attachment was commenced, without cauſe: For, as the proceedings took place in a foreign country, it would be too rigid to inſiſt upon copies, which perhaps could not have been procured. Therefore the judgment of the Diſtrict Court is not ſuſtainable upon the reaſons aſſigned by them: But for another reaſon I think it ought to be affirmed. The judgment of the Borough Court was certainly erroneous on account of the inſufficiency of the declaration. It is completely ſettled that in a ſuit for a malicious proſecution, it muſt appear that there was no probable ground for the proſecution; ſince the want of *probable cauſe* is the very git of the action; and therefore it muſt be avered. This averment is not ſupplied, in the preſent caſe, by the words *juſtifia-*

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ble cause; for the latter mean no more than legal cauſe: And there might have been a probable, though not a legal cauſe: The firſt might depend upon appearances at the time; the laſt upon the real ſtate of the caſe. The eſſential ground of the action, then, being omitted, the plaintiff cannot recover upon this declaration; for it has been often decided, that if the git of the action be not laid, a verdict will not cure the defect. *Dougl.* 679, 2 *Wash.* 187, 1 *Call* 83. The declaration would have been bad, upon demurrer, for another reaſon; namely, the omiſſion to charge that the attachment was ended, *Dougl.* 215: But that perhaps is aided by the verdict. However the failure to lay the want of *probable cause*, is deciſive; and therefore I am of opinion that the judgment of both courts ought to be reverſed, and judgment entered for the defendants.

LYONS Judge. Although there muſt, in order to ground this action, be a want of *probable cause* for the proſecution; and although it is uſual to lay in the declaration that there was no *probable cause*, yet I do not think it indeſpenſably neceſſary, that thoſe very words, and none other, ſhould be uſed; for any which are tantamount, and calculated to bring the probable cauſe fairly into iſſue, would be ſufficient: And I rather incline to think the words *juſtifiable cause* are of that kind; as they clearly admit of the evidence as to the want of *probable cause*. However it is unneceſſary to decide that point now; becauſe I am of opinion that the declaration is defective for another reaſon; namely, that it does not ſhew, whether the attachment has been determined, or not; without which it does not appear, whether the proceſs iſſued without probable cauſe or not; for, if the attachment ſhould be finally ſupported by the court in France, it would negative the idea, that it iſſued without a cauſe. It is therefore one of the main ingredients in the action: Of courſe,

it ought to be ſhewn; and until that is done, the injury cannot be eſtabliſhed, *Bull. n. pr.* 12, 13, *Dougl.* 215. For theſe reaſons I am of opinion that the judgment of the Borough Court was erroneous; and not for thoſe ſtated by the Diſtrict Court; with whom I differ, as to the admiſſibility of the evidence. For I think the evidence was proper, as it related to tranſactions, with reſpect to a civil ſuit in a foreign country; where the party might not have had it in his power to obtain copies, and the defendants letters had acknowledged the attachment. However, on account of the defect in the declaration, I concur that judgment ſhould be entered for the defendants.

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GEORGE,
againſt
BLUE.

In an attachment againſt an abſconding debt, judgment ſhould be firſt entered againſt the debtor, & then the garniſhee ſhould be ordered to pay it,

If the attachment demands only £48 15 5 and coſts, the court cannot give judgment for intereſt.

THE George's obtained an attachment from a magiſtrate againſt Sidwell, as an abſconding debtor for £48 15 5. Blue was ſummoned as a garniſhee, and confeſſed he owed Sidwell enough to pay the plaintiffs demand: Whereupon Sidwell being called, and failing to appear, the county court gave judgment "that the plaintiffs recover againſt the defendant the ſum of £48 15 5, "with intereſt thereon to be computed after the "rate of 5 per centum per annum from the 14th "day of December 1797 until paid, four dollars "and twenty eight cents, and their coſts about "their ſuit in this behalf expended: And it is "ordered that the ſaid garniſhee do pay unto the "plaintiffs the money condemned in his hands as "aforeſaid, towards ſatisfying this judgment." An attachment againſt the body of the garniſhee for not paying the money, was awarded, but afterwards quaſhed; and then a writ of *fieri*

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facias was iſſued againſt his property. He gave a forth coming bond; and judgment was afterwards rendered upon that, in favour of the plaintiff. Whereupon the garniſhee obtained a writ of ſuperſedeas, from the Diſtrict Court, to the firſt judgment: Which was reverſed by the Diſtrict Court, "Becauſe the ſaid county court entered "up a judgment againſt the abſconding debtor, "and an order againſt the garniſhee to pay the "money, when they ought to have rendered judg-"ment againſt the garniſhee only." From which judgment of reverſal, the George's appealed to this court.

The clerk certifies that there was filed in the attachment cauſe a copy of a judgment in favour of Derrell againſt the George's, for £45 7 7, with 5 per cent intereſt from the 13th of January 1797 until paid, and 4 dollars 28 cents, the coſts of the motion on a forth coming bond, Sedwell the principal not having recieved notice of the motion. Alſo a copy of the ſheriffs receipt for £48 15 5, the amount of the laſt mentioned judgment, and £2 8 10, for his own commiſſions.

ROANE Judge. The judgment of the Diſtrict Court in this caſe is erroneous in ſuppoſing that a judgment in an attachment ſhould not be rendered againſt an abſconding debtor, but againſt the garniſhee only.

By the law in all caſes where an attachment is returned executed, judgment is to be rendered againſt the principal. Where the attachment is returned executed on his effects, no further judgment is neceſſary, but an execution iſſues to ſell thoſe effects: But, when it is returned executed on his monies in the hands of the garniſhee, an additional judgment is neceſſary to condemn ſuch monies in his hands; and as a juſtification, and voucher, for him, in future, againſt the demand of the abſconding debtor.

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Both theſe judgments have been rendered in the preſent caſe. The criticiſm of the appellees counſel, that an order only, and not a judgment, is rendered againſt the garniſhee, is almoſt unworthy of an anſwer from the court: The effect and ſubſtance thereof is preciſely the ſame.

It may be objected that the judgment againſt the abſconding debtor is too general, in not ſtating the nature of the debt, ſo as to be a bar in future. The anſwer is, that the ſtatement in the record, that the judgment of Hampſhire court and the receipt in conſequence thereof were filed in this attachment (both of which are ſet out *in hæc verba*, and the latter of which entirely correſponds with the judgment in queſtion in relation to the ſum, and the time from whence it bears intereſt) fully aſcertains the ground of the judgment, and will ſerve as a perpetual bar. There is an entire analogy in this reſpect between the judgment, and the general judgment on forth coming bonds. In them the judgment is general, but it is headed by the clerk with a deſcription of the bond moved upon: and an annexation of ſuch bond follows the judgment.

There is only one error therefore in this caſe. The attachment ſtates that Sidwell is indebted in £48 15 5, without demanding intereſt: The ſheriff is required to attach ſo much of his eſtate as is ſufficient to ſatisfy the ſaid *debt and coſts*; and the garniſhee admitted himſelf indebted to the defendant a ſum *ſufficient to ſatisfy the plaintiff's demand*: He did not admit himſelf to be indebted *ultra*. The demand of the plaintiff therefore as ſtated and admitted by the garniſhee including coſts, and excluding intereſt, is that for which the judgment ſhould have been rendered againſt the garniſhee: Coſts may be included, not only becauſe neceſſarily incidental to all judgments, but becauſe the warrant to the ſheriff to levy expreſſly extends to them.

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Nor ſhould intereſt be included in the judgment againſt the abſconding debtor; not only becauſe not demanded; not only becauſe it is beyond the warrant of the ſheriff in relation to the amount to be by him attached; but alſo by analogy to the proceeding by a ſurety againſt his principal by motion under our law, which ſeems to exclude intereſt; and this mode of proceeding being a ſubſtitution for that, and equally ſummary.

The judgment of the Diſtrict Court therefore is to be corrected in this; and in this only.

FLEMING Judge. It was neceſſary for the county court to decide, in the firſt place, whether a debt was due from Sidwell from the plaintiff: But that done, the judgment againſt the garniſhee followed of courſe, upon his confeſſion, that he had effects enough to ſatisfy the demand. Conſequently the regular mode was that purſued, of firſt giving judgment againſt Sidwell; and then ordering Blue to pay the money, as he acknowledged he was Sidwells debtor, to that amount. It was objected that it did not appear, on the face of the judgment, upon what it was founded: But the papers filed in the cauſe afford abundant proof of the debt; and therefore that objection fails. I think, however, that the court erred in giving judgment for intereſt; for being a ſimple contract debt, I do not ſee how a court of law could, in a ſummary proceeding like this, award it. But this is not all; the attachment was for £48 15 5, and the coſts; which was all that the garniſhee can be fairly interpreted to have confeſſed he owed; and therefore he was chargeable with no more: Inſtead of which, he is ordered to pay £48 15 5 with intereſt and the coſts: So that under every point of view the judgment againſt the garniſhee is erroneous. Conſequently I am of opinion, that both judgments ſhould be reverſed, and judgment entered for £48 15 5, only, without intereſt; and that the execution and ſubſequent proceedings ſhould all be ſet aſide.

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CARRINGTON Judge. It was certainly right to enter judgment againſt the defendant firſt, and then to order the garniſhee to pay the amount. This is the uſual courſe, and is moſt conſiſtent with reaſon and the order of things; for it ought to be aſcertained that the defendant owes a debt, before his property is condemned to ſatisfy it. The county court committed an error, however, in awarding more againſt the garniſhee, than he can be fairly underſtood to have confeſſed was in his hands: For the attachment was for £48 15 5, only, and coſts; and his confeſſion ought not to be extended further. But the county court have ordered him not only to pay that ſum, but intereſt alſo: Which exceeds the ſum confeſſed; and therefore the court erred in this reſpect. If however intereſt had been demanded in the attachment, I do not ſee why Sidwell ſhould not have been condemned to pay it. But as the debt is not ſufficiently proved upon the record, although it might have been upon the trial, as the exhibits there might have been properly verified, I think the judgments ſhould be reverſed and the cauſe ſent back to the county court to be further proceeded in, with an inſtruction not to enter judgment for more than £48 15 5, and coſts, without intereſt

LYONS Judge. I am of opinion that the judgments are both erroneous. That of the county court is ſo; becauſe it does not appear by the record that the plaintiff proved his demand againſt Sidwell, without which no judgment ſhould have been rendered againſt him; for although the papers filed, if properly verified, and explained by evidence, would ſerve as a foundation for the demand, yet they certainly do not eſtabliſh it as the record at preſent ſtands: For although the debtor made default, that would not authoriſe the judgment, without legal proof of the claim; eſpecially as no preſumption is to be allowed in caſes of ſummary proceeding. 1 *Stra.* 97, *Cowp.* 29, 642, 1

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Term rep. 153. Beſides the obſervation that the judgment againſt the garniſhee is for more than he confeſſed he had, is ſtrictly correct. I think therefore that both judgments ſhould be reverſed, and the cauſe ſent back to the county court, to be further proceeded in, with an inſtruction not to enter judgment for more than the £48 15 4, and coſts, without intereſt.

The judgment entered by this court was as follows:

The court being of opinion that the judgment of the Diſtrict Court is erroneous, reverſe it; and proceeding to give ſuch judgment as the Diſtrict Court ought to have given, is of opinion that the judgment of the county court is alſo erroneous; therefore that judgment alſo, together with all the proceedings, ſubſequent thereto, in that court are likewiſe reverſed: "And it is further conſidered that the appellants recover againſt the ſaid James Sidwell £48 15 5, the ſum ſtated in the ſaid attachment to be due to them, and their coſts by them expended in the ſaid county court in the proſecution of the ſaid attachment; and further that the appellee, who acknowledged himſelf to be indebted to the ſaid James Sidwell, in a ſum ſufficient to ſatisfy the appellants demand againſt him, do pay to them the aforeſaid ſum of £48 15 5, and the coſts in the ſaid county court."

BEDINGER,

against

COMMONWEALTH,

THE Attorney for the ſtate filed an information againſt Bedinger, ſtating, 1. A promiſe to give one of the magiſtrates, if he would vote for him as clerk of the county court, one 18th of the profits of the office, 2. A certain ſum of money, for the ſame vote.—Plea not guilty, and iſſue.—Upon the trial of the cauſe, the jury found the following verdict, "We the jury find the defendant guilty, if in the opinion of the court an offer and declaration made by the defendant to Daniel Collett in the information mentioned, a juſtice of the peace of the county of Berkley, authoriſed to vote for the appointment of clerk of the court of ſaid county, being a court of record, and the ſaid office of clerk being vacant, that he the defendant would give to him the ſaid Daniel Collett one 18th part of the profits of the ſaid clerkſhip of ſaid court, and that he the ſaid defendant, would inſure him the ſaid Daniel Collett, that he the ſaid Daniel Collett ſhould receive one hundred dollars the firſt year, ſomething more the ſecond year, and afterwards from one hundred and twenty to one hundred and fifty pounds a year, if he the ſaid Daniel Collett, would vote for him, the defendant, to be clerk of ſaid court at an election of clerk of ſaid court thereafter to be duly holden, which offer and declaration was not accepted by the ſaid Daniel Collett, who, at an election duly held for clerk of ſaid county, voted againſt the ſaid defendant, be a making a promiſe to pay money for the vote of the ſaid Daniel Collett, for him the ſaid defendant to be clerk of ſaid court within the operation of the act of Aſſembly entitled, 'An act againſt buying and ſelling of offices:' Otherwiſe we find him not guilty under the ſaid

This court has no criminal juriſdiction; and therefore no appeal lies to it, from a judgment, of a diſtrict court for a miſdemeanour.

Bedinger, vs Com'nwealth.

"act of Assembly, but guilty at common law, and "in the latter case amerce the defendant in the "sum of one hundred dollars."

The District Court was of opinion, that the offer and declaration, as set forth in the verdict, was a promise made by the defendant, contrary to the act of Assembly; and therefore gave judgment that the defendant was utterly incapable of serving in the office of clerk of the court of the county of Berkley, and that he should pay the costs of the prosecution. From which judgment Bedinger appealed to this court.

WIRT and WICKHAM for the appellant. The question is, whether the verdict finds a promise, within the meaning of the act of Assembly? A mere offer by one, not accepted by the other, is not a promise; for it creates no obligation. The act of Assembly is copied from the *Stat. Ewd;* and there is no instance of a prosecution under that statute merely for an attempt to bribe. The *King* vs *Vaughan*, 4 *Burr.* 2094, and the *King* vs *Plimpton*, 2. *Lord Raym.* were both at common law, and not upon the statute. The *stat.* 2 *Geo.* 2. *Cap.* 24, against bribery at elections for members of parliament, is a statute of the same kind; but no public prosecutions, for an attempt to bribe, founded on that statute, appear in the English reports: For *Sulston* vs *Norton*, 1 *Black. rep.* and *Bush* vs *Rollins*, refered to in it, were both actions of debt: Which looks as if it had always been considered, there, that an attempt, or offer, was not within the meaning of such statutes. This is a penal law; and therefore to be construed strictly. Of course, as neither *offer*, or *attempt*, is to be found in it, the court will not include them by an equitable construction. The word promise, used in the act, is tautolagous; and means the same with the next word agreement, which certainly requires acceptance of the offer, in order to bring it within the act. *Promise* always implies accept-

ance; all writers define it ſo, *Paley*, *Philos.* 99, 3 *Black. Com.* 157. An attempt to commit an offence is, in no inſtance, conſidered the ſame as the offence itſelf. Thus an attempt to ſuborn one to commit perjury, is not a ſubordination of perjury, unleſs the witneſs agrees and commits the perjury, *Lord Ray.* 889. So an attempt to commit murder is not murder. Bedinger might only be ſounding to ſee what lengths the other would go; and might not really have intended to bribe. There is no neceſſity for extending the conſtruction of the law; becauſe an attempt is an offence at common law, and is puniſhable as other miſdemeanors are. The jury have not found the offence with ſufficient certainty: for the verdict does not ſtate what he is guilty of; nor the time when the act was committed; and perhaps it was before the act of Aſſembly; or if ſince, it might have been barred by the act of limitations, when the proſecution was commenced. If the Legiſlature had intended, that the bare offer ſhould be a ſufficient offence, they would have inſerted it.

NICHOLAS and CALL *contra.* The finding is certain enough, 1 *Call* 246, and amounts to ſuch a promiſe as is within the meaning of the act; which is to be conſtrued liberally, becauſe it was made to remedy a miſchief. It is not to be conſidered as a penal ſtatute; for the difference is, when it operates on the perſon, and when it operates on the thing only and not upon the perſon. 1 *Black. com.* 88, 19 *Viners abr.* 521, *pl.* 95. An attempt to bribe is criminal, at common law, 3 *Inſt.* 349, *Hawk.* 168—9: And it is as dangerous as the offence itſelf. Of courſe, ſuch a conſtruction ſhould be made of the act as may prevent it. Unleſs ſuch a promiſe as this be within the ſtatute, it will be impoſſible ever to prove the offence; becauſe there will never be a witneſs to an actual agreement. There is a difference between a *promiſe* & a *contract*; for no aſſent is requiſite to the firſt, but it is to the laſt. *J. Dict* 1 *Pow. Contr.* 6. 176. 260. 334:

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Which is the language of reaſon, and formed part of the Roman law, not by any poſitive act of legiſlation, but as a principle of univerſal juriſprudence. It is no objection that an action would not have lain upon the promiſe; for that does not make it leſs a promiſe. An attempt to bribe although the offer was not accepted, has been decided to be an offence, *The King* vs *Plimpton*, 2 *Lord Raym.* 1377: Which caſe proves the general principle contended for by us; for whatever is neceſſary to give a title, or conſtitute offence, muſt be avered; and therefore, if the aſſent is neceſſary, the indictment there, ought to have ſtated it. The act of Aſſembly ſhould be ſo conſtrued as to give effect to each word; and therefore the word *promiſe* which is ſuſceptible of a diſtinct meaning, is to be underſtood according to the common acceptation of it: Eſpecially, as the Legiſlature appear to have contemplated a diſtinction, and not to have uſed it as ſynonymous with *agreement*. This is the ſtronger from this conſideration, that there is a penalty impoſed upon the perſon who accepts; which ſhews that the Legiſlature conſidered them as diſtinct acts; that is to ſay, that *promiſe* was the act of the perſon promiſing, and *acceptance* the act of the perſon to whom it is made.

RANDOLPH in reply. *Promiſe* in the act is to be underſtood in the ſenſe at common law; and not according to the opinions of civilians, and the compilers of dictionaries. The definition of it, in 3 *Black.* 157, expreſſly requires the aſſent of the other party. The whole complexion of the caſe of the *King* vs *Plimpton* ſhews it was an indictment at common law, and not upon the ſtatute. Bribery, neceſſarily, requires the aſſent of both. The law is penal, and not to be liberally conſtrued againſt the offender. Although the acceptance might have been void, ſtill it was neceſſary: Becauſe the common law does not admit that there can be a promiſe without it. The offence, charged in the information, is, that of making a pro-

miſe for Collets vote; but the offence under the act, is making a promiſe for the appointment; and, by 2 *Hawk.* 249, it appears that the material words of the ſtatute ought to be laid. Bedinger, *vs.* Com'nwealth.

Cur adv. vult.

The counſel for the appellee, having taken an exception to the juriſdiction of the court, that point was ſpoken to this term. November, 1803.

WICKHAM for the appellant. The act of Aſſembly, relative to the juriſdiction of this court, ought to be conſidered upon common law principles; and upon them the juriſdiction would, clearly, be ſuſtained in England. *Rev. cod. pleas. edo.* 60, 62, defines the juriſdiction, but obliges us to refer to page 82 for a fuller explanation. Theſe paſſages are general, and make no difference between civil and criminal caſes. No reaſon exiſts why this court ſhould not have the ſame juriſdiction in the one as in the other. In England a writ of error lies in both; and it is not preſumeable that the Legiſlature meant a diſtinction. In *Rev. cod. pleas. edo.* 202, an information is given for the penalty in caſes of ſmall pox. Now if an action of debt is brought the right of appeal would be clear; but change it into an information, and then according to the doctrine contended for on the other ſide, no appeal can be allowed: Which would be abſurd. Wherever the object of the ſuit is property, or a freehold, or franchiſe, the court has juriſdiction; and as the preſent caſe involves property, or at leaſt, a freehold, *Rev. cod.* 645 *Bac.* 199, that will be ſufficient; to ſupport the right of appeal. The word *franchise* alone would be enough; for that is a privelege, or exemption, derived from the Commonwealth. And the preſent caſe relates to it. The conſtitution ſays, the clerks of county courts ſhall hold their offices during good behaviour; and the act of Aſſembly, againſt ſubjecting the clerk to the loſs of his office, neceſſarily relates to a freehold.

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NICHOLAS and HAY *contra.* The defendant, in a criminal case, cannot appeal, or have a writ of supersedeas: No law has specified such a right, and it would not have been left to construction, if it had been intended by the Legislature. A court newly created possesses no jurisdiction but what is expressly given, or is necessarily implied. 4 *Inst.* 200. The revised code 67, includes five classes, 1, those which are constitutional; 2, those originating here; 3, those adjourned here; 4, those depending here in 1792; 5, writs of error, supersedeas &c. Which last requires 100 dollars, a franchise, or freehold. The present case involves neither. The information charges a specific crime, which was the fact in controversy; and therefore it did not relate to a freehold, or franchise; because offence, or not, was the matter in dispute. The loss of the office is merely the punishment of the offence; and therefore is not the subject in controversy, any more than a forfeiture of the estate, upon the conviction in a criminal case, is the matter in dispute there. If the appellant had not succeeded in the election, could he have appealed upon the ground of a freehold, or franchise? Surely not; and, if so, how can he appeal as the case is? For it does not appear, from the proceedings in the cause, that he was elected, and in office. But the office of clerk is not a freehold, (which concerns the realty, 2 *Black. com.* 104;) nor franchise: For *Jacob law dic.* and 2 *Black. com.* 37, defines it to be privilege or part of the regal prerogative held by a subject. Which cannot apply to this country, 4 *Article Bill of rights.* The language of the *Rev.* 67, and 88, relates to civil cases. Thus a bond is to be given upon taking the appeal. But for what is a bond to be given, in such a case as this? The condition, to the bond which has been actually taken, is, that he will comply with the judgment of the court: Which is nonsense; because the judgment is, that he shall be incapacitated to hold any office of trust or profit. If the appeal lies in the present case, why not in all criminal cases? Where the defendant is charged with an offence there the

court has no jurisdiction; but where it is for a penalty, there the court has jurisdiction, although the proceeding is by information, as in the case of the smallpox, cited by the counsel on the other side. Several reasons occur why the court should not exercise jurisdiction in criminal cases. If capital it would be useless, as the judgment would be executed before the decision here. If it was not capital, but imprisonment, the defendant would have suffered the whole or part of the punishment, before the judgment here.

RANDOLPH in reply. The appellant was clerk *de facto* at least: and the clerks of county are only removable for misbehaviour, and that by judgment of the general court. This court has a general superintending controul over subordinate jurisdictions: And the act gives it expressly in cases of freehold; which is not confined to lands. For the public officers, as judges &c. who hold for life, have freeholds. *Controversy* in the act means all disputes not prohibited. The case of a forfeiture, put on the other side, does not apply; because no judgment is rendered for the forfeiture in the first instance. So that the property is no part of the sentence in that case. If the candidate does not succeed in the election, he is not punishable on the statute, but only at common law. The appeal bond operates for payment of the costs, and may be necessary to oblige the party to appear, and hear judgment, as was formerly practised in the cases of adjournment. There is a good reason for a distinction between capital cases and the minor offences; because, in the first, no provision is made for removing the defendant to this court in order to hear judgment, but there is no necessity for it in the other. The information is against the defendant as holding the office, and taking the profits of it; and therefore the prosecution essentially concerned his interests. There is no danger of injury from extending the jurisdiction according to our idea; for we only confine it to cases of property, or value. The words recover and claim in the 14th section, are answered by *office;* which is the subject of controversy.

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There is no danger of double punishment, because in the first place, the defendant would solicit it himself, and therefore connot complain.

Cur. adv. vult.

ROANE Judge. The important question now to be decided is, Whether this court has jurisdiction of the case now before us? It is an appeal from a judgment of the District Court of Winchester, rendered upon an information against the appellant for bribery in the election of a clerk for the county of Berkley. The judgment is that the appellant is utterly incapable of serving in the office of clerk for the said county, and that he pay the costs of the prosecution.

The ground I shall take in delivering this opinion, will equally apply to, and decide certain other cases now depending before us.

Before I come to a particular examination of the several acts and clauses, relating immediately to this subject, I will make some general observations.

The sense of the convention, who formed the constitution, was not that the court of appeals should have jurisdiction in all cases. The constitution has depositted with the General Court the final jurisdiction on impeachments.

The judgment in such cases to be given against the highest officers of the government, may not only be of perpetual disability to hold any office, but to suffer such pains or penalties as the law shall direct.

This then is a high authority excluding the jurisdiction of the Court of Appeals, in a very penal and important case.

A nearly cotemporaneous Legislature, (in 1777) pursuing this same principle, depositted with the same court the final jurisdiction (as it is on all hands confes-

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ſed) in treaſons and felonies: It is remarkable alſo, that the original act conſtituting the General Court, (as well as the ſubſequent ones) after declaring its juriſdiction to be "general over all perſons and in all "caſes, matters and things, at common law," deemed it neceſſary to confer a juriſdiction by expreſs words in all "treaſons, murders, felonies and other "crimes and miſdemeanours;" thereby clearly implying that the juriſdiction over the latter ſubjects was not conveyed under the former general and extenſive expreſſions.

It is further to be obſerved, that the Legiſlature in 1779 excepted even a civil caſe from the juriſdiction of the Court of Appeals, and made the determination of the General Court upon it final. I mean in the caſe of caveats.

The high confidence thus manifeſted in the tribunal of the General Court, by the founders of our government, and the primeval Legiſlatures was not miſplaced: That court was then conſtituted of five members elected purſuant to the conſtitution, not yielding in grade to any other judges, being co ordinate with the judges in Chancery, and forming with them, and the judges in admiralty, the Court of Appeals; which court had then no ſeparate and excluſive members.

To a court thus conſtituted and confided in, with whom in the laſt reſort, theſe important and extreme caſes of juriſdiction are confeſſedly depoſited, it would ſeem a natural part of the ſame ſyſtem to confide the reſiduary and inferior claſſes of criminal juriſprudence.

The tenderneſs and leaning of our code in favour of the criminal, the uncontroulable power of the jury to acquit in a criminal caſe, the pardoning power of the executive, and the objection to great delays in the execution of the criminal law, fully juſtify this policy in the Legiſlature.

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If it be ſaid that the criminal or party proſecuted, has loſt by the reform of the General Court, and eſtabliſhment of Diſtrict Courts, in relation to the number of the judges, it may be anſwered, that he has gained by certain proviſions introduced into the latter ſyſtem, in reſpect of a diviſion of a court &c. and by the better chance he now has of being tried by a jury of his neighbours.

But it will hardly be contended for (under the proviſions of the Legiſlature itſelf) that any difference exiſts between the ſyſtems relative to a right of appeal to this court; and I preſume that the ground now taken would equally have been ſet up had the original ſyſtem never been altered.

The particular expreſſions in the acts in queſtion, as applying to controverſies of a civil nature, are appropriate and clear as going into the field of criminal juriſdiction they are inapplicable; and gentlemen differ among themſelves as to the partition line of juriſdiction.

The terms in the act conſtituting the Court of Appeals "If the matter in controverſy be equal in value &c." are clearly relative to the ſubject of a civil proceeding; and the proviſion relative to "franchiſe or freehold," is only meant to diſpenſe with any ſtandard of valuation as to them, on account of their dignity or nature, and not to make any departure from the ſyſtem of the act, ſo as in reſpect of them, to tolerate a criminal proceeding in which they may be involved.

By the ſame act we are refered to the Diſtrict Court act on the ſubject in queſtion: The terms whereof are "any perſon &c. ſhall think himſelf aggrieved &c. in any action, ſuit or conteſt whatever &c. he ſhall be permitted to appeal &c.

Theſe words (if ſtanding alone) are not more ſtrong than the general words confering a juriſdic-

tion in the General Court law of 1777 before noticed, (and which are kept up in the District Court law:) and we have a Legislative exposition that they are not adequate to confer a criminal jurisdiction, arising from the insertion of the other words hereafter added.

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But these words do not stand single. The subjoined terms "debt or damages," "recovered or claimed," "shall be of the value &c," all strictly apply to cases of a civil nature, and are inconsistent with those of a criminal nature.

I might go on and pursue other passages of the laws corroborating this idea; especially those relating to the bonds to be given on appeal &c. But this having been satisfactorily done by the appellees counsel, I will merely declare my concurrence in their criticism.

This then is the true criterion, that wherever the direct object of the proceedings is the discussion and decision upon a civil right (whatever may be the form of the proceeding) an appeal may be taken. For example, some informations may be included under this distinction, such as informations in the nature of *qui tam* actions for penalties, (which in common with actions of debt) lie for penalties &c; and all other kinds of proceeding, whatever may be their form, the direct object of which is to assert a right of a civil nature, and which are deemed proceedings of a civil nature.

But the prosecution now before us is instituted against the defendant upon the ground of crime; and the incapacity to hold the office now in question is the punishment prescribed therefor.

In 4 *Black* 390 forfeiture is considered as merely an incident of punishment: nor can the spirit of the general principle be evaded, by pointing the judgment as in this case against the future tenure of the *very office*, in acquiring which the crime was committed.

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One of the appellants counsel took in terms the true criterion of jurisdiction; but his application of it to this case was erroneous. He supposed that that which was merely an incident to the judgment may be considered as the direct object of the proceeding.

Another of those gentlemen took another ground: another criterion of jurisdiction, which certainly cannot be subscribed to. He supposed the true rule to be furnished by the act concerning bail. That in those cases which are bailable, as not affecting life or limb, we have a jurisdiction; but in the higher offences otherwise. I presume he spoke, and I now speak, without a reference to the new criminal system. His criterion would have this consequence, it would let in the lesser felonies, such as petit larceny &c. whilst it excluded the greater. The punishment against petit larceny for instance does not go to life or limb, it is therefore bailable under that act; and it is a felony as it incurred a total forfeiture of lands and goods. Yet the nature of the crime is precisely the same with grand larceny, and it is equally a felony: There is no distinction, but in the punishment.

Without adverting to the improbability of a system which would enter upon a large field of jurisdiction, and shew a greater regard to the liberty, than the life of the offender, we can find no reason justifying such a discrimination as that between the two species of larceny, and letting in some crimes of precisely the same nature in exclusion of others. I believe no legislature ever proceeded upon such a principle.

Such is my opinion upon this question after a full consideration. In two of the reported cases (and perhaps in others) a jurisdiction was entertained in opposition to the principles now declared; but the objection was not taken. Those cases passed as to this point, *sub silentio*; and the

general principle implying a jurisdiction in the supreme Court of the Commonwealth obscured, in the distant view of the court, that result which now clearly emerges from a particular examination of our statutary system.

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I am therefore of opinion that the appeal should be dismissed.

FLEMING Judge. The act of Assembly is the foundation of the jurisdiction of this court; and that confines it to cases of a civil nature altogether. The words, "if the matter in controversy be equal to one hundred dollars," clearly shew that civil cases only were intended to be refered to the determination of this court; for, if it was meant to include those of crime, it is very difficult to conceive why it should have been left to mere construction, without any positive declaration to that effect. There can be no ground for the distinction between higher and lower offences: Both must be the subject of appeal, or neither; and therefore when the appellants counsel admit, that the court has not jurisdiction over the higher, they, in effect, admit, that it has not over the other. I am consequently of opinion, that the appeal was improperly granted, and that it ought to be dismissed.

CARRINGTON Judge. The jurisdiction of this court is derived from the act of Assembly; and it can exercise no authority, but what that gives. By the second section of the act constituting the Court of Appeals, the jurisdiction is declared to extend to cases provided for by the constitution; to suits originating there, or adjourned thither for trial by any statute; to cases depending therein at the time of passing the act; and to appeals, writs of error, or supersedeas, to reverse decrees of the High Court of Chancery, judgments of the General Court, or District Courts, if the matters in controversy be equal in value, exclusive of costs, to one hundred dollars in the Dis-

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trict Courts, or one hundred and fifty in the general Court, or High Court of Chancery, or be a freehold, or franchiſe. None of which deſcriptions is applicable to the preſent caſe: For it is not a caſe ariſing under the conſtitution, nor did it originate here, nor has it been adjourned hither by any ſtatute; nor was it depending here when the act paſſed; nor is it of one hundred dollars value; nor ſuch a diſpute about a freehold, or franchiſe as was contemplated by the act; which, from the whole complexion of it, meant to exclude every kind of criminal juriſdiction, created by the Legiſlature and to confine the court to the examination of controverſies of a civil nature altogether. And the only reaſon for inſerting the words *freehold* and *franchiſe* was the apprehenſion, that unleſs mentioned, they might not be thought included within the powers given the court: Of courſe, as the act is the ſole baſis of our authority, and that, ſo far from giving a criminal juriſdiction, has cautiouſly avoided it, I am of opinion that the appeal ſhould not to have been allowed, and that it ought now to be diſmiſſed.

LYONS Judge. I am of opinion that this court has no criminal juriſdiction except in ſpecial caſes provided by law. I was of that opinion upon a former occaſion, and I continue of that opinion ſtill. For the act of Aſſembly mentions ſubjects of a civil nature only, and does not, even by inference, extend to thoſe of crime. The words, "if the matter in controverſy be equal in "value, excluſive of coſts, to one hundred dollars "in the Diſtrict Courts, or one hundred and fifty "in the General Court, or High Court of Chan"cery," are deciſive, as they, neceſſarily, relate to civil cauſes only. For the expreſſion "equal in value," can apply to nothing elſe. Nor do the words *freehold* or *franchiſe* embrace the preſent appeal; becauſe they ſtill relate to controverſies of a civil nature concerning them; that is to ſay, where a civil action, and not a criminal proſecu-

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tion is brought. But here, not only is the proceſs of the criminal kind, but the very point charged and put in iſſue is, whether a crime has been committed or not? So that the judgment is, that the defendant has done a criminal thing, and the loſs of office is but the conſequence of it. Then as the act of Aſſembly has confined the juriſdiction of the court to civil caſes, unleſs in thoſe ſpecially provided for under the conſtitution, or particular ſtatutes, it follows, neceſſarily, that the court cannot aſſume it in the preſent caſe; and therefore that the appeal ought to be diſmiſſed.

TABB,

againſt

BAIRD.

If the verdict does not find title or poſſeſſion in the grantor he can convey neither and therefore his grantee cannot maintain an ejectment againſt the tenant in poſſeſſion.

Quere: Whether a deed of bargain and ſale for land, by one out of poſſeſſion, is not void?

IN ejectment brought by Baird againſt Tabb's repreſentatives, for a piece of land in the town of Peterſburg, the defendants filed a bill of exceptions to the court's opinion; which ſtated, that they objected to the introduction of a deed from Blow and wife to the plaintiff, dated 2d January 1797, for "a parcel of land in the town of Peterſ-"burg, on the ſouth ſide of the ſtreet thereof, be-"ing part of a tract purchaſed of Newſum & wife, "by deed dated the 21ſt of October 1783, begin-"ning at the center of the brick houſe run, thence "S. 84°, W. 6 p. thence N 4°, W. 19 p. 16 l. "thence S. 86°, W. 13 l. thence 10° W. 7 p. "to the main ſtreet of Peterſburg; thence down "the ſaid ſtreet 8 p. 10½ l, to the center of the brick "houſe run at the bridge; thence up the ſaid run "to the beginning," *to ſhew that the plaintiff had a legal right to the land in diſpute, of which the defendants, at the time of the execution of the ſaid deed, were in actual poſſeſſion*, claiming the ſame under a deed from Ravenſcroft to Tabb,

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(dated 4th December 1793) for 21 acres of land in the town of Peterſburg, "beginning on "the ſouth ſide of Appomatox river at the mouth "of a ſmall gut, and extending thence S. 16° E. "174 p. to a corner in Bolling's line; thence "S. 71° 30 min. W. 24 p. 16 l. to the middle of "the ſtreet; thence N. 15° W. 108 p. to the "brick houſe run; thence down the brick houſe "run to the river, as the ſame meanders, thence "down the river to the beginning." But that the court overruled the exception, and permitted the ſaid deed to go as evidence to the jury; becauſe the poſſeſſion, which the defendants had, was by the building a houſe over the brick houſe run, and changing its courſe at the time mentioned in the ſubſequent exception: Which is as follows:

That the plaintiff offered in evidence the deed from Newſum and wife to Blow, dated 21ſt October 1783, for 1¼ acres 13 p. "Beginning at J. "King's lower corner at the road leading through "Peterſburg; thence N. 84° E. 5 ch. 29 l. along "the ſaid road to the brick houſe run at the bridge "thence S. up the ſaid run 11 ch. 38 l. thence S. "84° W. 5 ch. 26 l. thence N. 11 ch. 38 l. to the beginning." As alſo the deed from Blow to the plaintiff: And proved, by witneſſes, that the courſe of the brick houſe run, was altered by Tabb, after the 21ſt October 1783, and before the 2d January 1797, to wit in 1786; That the defendants objected to the evidence by witneſſes, becauſe the deed, under which the plaintiff claims, ſtates the brick houſe run, as it meanders, to be the boundary line, and therefore he was precluded from bringing parol teſtimony to ſhew an alteration in the courſe of it previous to the time when his right accrued, but this objection was likewiſe overruled. Verdict and judgment for the plaintiff: To which judgment the defendants obtained a writ of ſuperſedeas from this court.

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HAY for the appellant. Blow's deed only conveyed the land according to the courſe of the run at the time, and not that which had been made, in conſequence of the changes in the ſtream. Therefore Baird cannot claim any more than would paſs according to the courſes of the run at the date of making the deed. One out of poſſeſſion cannot convey the deed of bargain and ſale.—*Duval* vs. *Bibb* in this court, * is not againſt me; becauſe there Bibb himſelf was the perſon who conveyed to Duval, and was by him permitted to remain in poſſeſſion. At common law, the rule was poſitive that a choſe in action, or right of entry could not be granted. *Litt. ſect.* 347. *Co. Lit* 214, 268. 3 *Bac.* 446. 2 *Co.* 56. 3 *Co.* 10, 11. 3 *Black com.* 175, 4 *Black com.* 135. *Pow. Dev.* 35, 233. 2 *Bac.* 52. This is not founded on the ſtatute of wills, but on the common law rule, *Cowp.* 90. The rule, that he who claims as heir, muſt claim from him who was laſt actually ſeized, applies with great force in the preſent caſe; for the heir of ſuch a grantee could not recover, becauſe he would not claim from the perſon laſt actually ſeized. If then the grantee could not tranſmit the inheritance to his heir, he cannot convey to another. At common law a deed of bargain and ſale only raiſed an uſe; and therefore poſſeſſion was neceſſary, or nothing paſſed. 2. *Black. Com.* 335. 337. *Saunders Uſes*, 314. This idea ſupported by the act of Aſſembly *Pl. Rev. Cod.* 159: For there the word *poſſeſſion* is expreſsly inſerted, as neceſſary to give validity to the conveyance. At any rate the act concerning pretenſed titles *Pl Rev Cod.* 37, was ſubſequent to it; and therefore it is clear, that the legiſlature intended that a matter in action, or depending upon a right of entry, ſhould not be conveyed. The act of Aſſembly is the ſame as the Stat. of *Hen.* in England; and, by the conſtruction of that Statute a ſale by one out of poſſeſſion, has been held to be within the po-

* *Ante*, 262.

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nalties of the act, *Co. Litt.* 369. It will not be sufficient to say, that the penalty may attach, and though the conveyance will be good. For that is not so; because it would be void as contrary to law, in which case a court would not assist. *Cowp.* 343. Therefore the judgment, which affirmed the conveyance is erroneous; and ought to be reversed.

ROBERTSON *contra.* The parties are bound by the description of the boundaries of the run contained in the deed; and that description included the premises in dispute; for it was intended to convey all that Newsum conveyed to Blow. The conveyance was good; for the authorities cited upon the common law doctrine do not apply; because they all related to feoffments, and not to statutary conveyances. The passage from Blackstone relative to maintenance, proves that there may be such a conveyance. For how could a man grant to a fictitious lessee a right to prosecute the title, if he could not convey the title itself? for the lease is a portion of the title; and if he could convey a part he certainly might convey the whole. *Duvall* vs *Bibb* is understood to have settled a rule different from that contended for upon the other side. The case from Cowper does not apply, as it related to a different subject; it respected after acquired lands. The act concerning pretensed titles was only meant to apply to cases where there was no right of entry. The rule of the common law was founded on the ground that the powerful would oppress the weak; which is not to be feared at this day. The argument concerning the inheritance is in fact the same question; for, if a title was conveyed to him, his heir would inherit that title from him. The appellants doctrine would go to prove that a man might acquire a right by tort. The statute of uses in England, as well as our act of Assembly, transfers the use to the possession; that is to say, they unite the title and possession together, in the same manner as if a complete feoffment had been made. And suppose

a feoffment made on parcel, ought it to be defeated by some person happening to be on a small part, although that circumstance was not known at the time?

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Cur. adv. vult.

ROANE Judge. This was an ejectment for a lot in Petersburg, brought by the appellee against the appellant. The appellee recovered the same; to which judgment a supersedeas was obtained.

On the trial the counsel for the defendant filed his exception, stating an objection to the introduction of the deed under which the lessor claimed (that deed is dated on the 2d of January 1797, is given by Blow and wife to the plaintiff for a lot *now properly belonging to them* bounded &c. &c. &c. and all the right, interest, &c. in the same and every part thereof) as evidence to shew that the plaintiff had a legal right to the land in dispute, of which the defendants, at the time of the execution of the said deed, were in actual possession, claiming it under a deed (of the 4th December 1793, from Ravenscroft to J. Tabb.)

The court overruled the objection, and permitted the deed to go in evidence for the purpose aforesaid, "because the possession, which the defendant "had, was by building a house and changing the "course of the run at the time mentioned in the "other exceptions."

That the plaintiff also produced in evidence a deed, from Newsum and wife, to Blow, of the 21st October 1783, of bargain and sale for valuable consideration, and offered witnesses to prove that the course of the run (the boundary in question) was altered by Tabb (under whom the defendants claim) after October 21st 1783 and before January 2d 1797, that is to say in 1786, and the defendants counsel objected to the testimony urg-

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ing "that as the brick run, *as it meanders*, is stated in the plaintiffs deed to be their boundaries, "parol evidence, to shew its course to have been "altered prior to the date of the deed, was inadmissible;" but the court overruled that objection also.

Two questions are made by the appellants counsel: One a particular one arising under the deed in question, and applying only to this case; the other a general question, and of very extensive importance.

That general question is, Whether a deed of bargain and sale, by a bargainor not in possession of the premises, conveys a title under which the bargainee can recover?

When I say a bargainor, not in possession, I mean having neither an actual possession, nor that statutory possession which he might acquire under our act as bargainee to some other person having possession.

It was argued, and may be alledged, that the defendants in the present case were merely disseisors as to part of the premises conveyed, and so the case is different from that of a total disseizin. But it is a clear law that if there be two disseisors, or one disseisor, who conveys to two feoffees, an entry must be made upon both. 3 *Black.* 175: This is supposed to be a complete answer to that objection.

As to the general question just stated, the case of *Duval* vs *Bibb* is relied on. I sat in that case, and entirely concurred in the decision that was given in it. In that case Bibb had been long in actual possession; he conveyed to Graves by bargain and sale. Graves had therefore a statutary possession, and conveyed to Duval. The jury found an adverse possession in Bibb against Graves

and thoſe claiming under him, *except as to the operation of the deeds.* The court were of opinion that Bibbs poſſeſſion was transfered to Graves, under our act on that ſubject; that Graves was therefore competent to convey to Duval; and that Bibbs poſſeſſion was not adverſe as the jury conditionally found it, but was the poſſeſſion of Graves: under the operation of the deeds ſubmitted for their deciſion. The court were alſo of opinion that as there was an actual poſſeſſion of more than one year in thoſe under whom the plaintiff claimed, that circumſtance took this caſe out of the ſtatute concerning pretenſed titles. The court were further of opinion that that act concerning pretenſed titles impoſed a penalty, but did not avoid a conveyance.

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Theſe poſitions, except the laſt, are ſo evident as to require no illuſtration.

Under the laſt poſition, it is to be obſerved, that the act concerning pretenſed titles does not declare the conveyance therein inhibited *to be void.* It leaves the effect and legal operation of ſuch conveyances to be decided by the laws relative to the ſubject. It proceeds upon the maxim "*Factum valet, fieri non debet.*" The miſchief againſt which the Legiſlature pointed this law; againſt which it denounced penalties, was the ſelling titles without poſſeſſion, or upon a ſhort, and therefore probably a colourable poſſeſſion. But it did not, nor was there any occaſion for it, change the rules of law relative to the ſubject of titles.

But it has been infered from that deciſion, that no poſſeſſion at all, either actual or ſtatutary, is neceſſary to be in the bargainor at the time of the conveyance.

I have revolved this ſubject much in my own mind, and cannot be of that opinion: Nor do I think that the caſe of *Duval* vs *Bibb* has gone ſo far as it has been contended.

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I will examine the moſt prominent reaſons which would be probably urged to juſtify that poſition.

1. It may be ſaid that the words of our act of Aſſembly are very ſtrong, being that "the poſſeſſion of the bargainor ſhall be conveyed as perfectly as if the bargainee had been enfeoffed with livery of ſeizin;" and that theſe words "are not in the ſtatute of uſes." It is true they are not. But the anſwers are, 1. That theſe words relate to the poſſeſſion of the bargainee, not that of the bargainor. 2. That a ſimilar conſtruction had taken place upon the ſtatute of uſes, and our act not only took up and enacted in ſtrong terms the ſubſtance of that ſtatute, but alſo the conſtruction which had taken place upon it. And 3dly, a poſſeſſion in the bargainor is preſuppoſed by the very terms of the clauſe.

2. It may be ſaid that the emphatical word *seized*, contained in the Engliſh ſtatute of uſes, is omitted in our act; whence it is inferable that under the latter a ſeizen, or poſſeſſion, is not neceſſary. The anſwer is, that the introduction of that word in the ſtatute of uſes had been adjudged to exclude terms for years, or chattle intereſts,—2 *Black* 336, and the omiſſion of it in our act may fairly be attributed to a deſign to embrace thoſe intereſts; intereſts which lie in poſſeſſion, and not in *seizen*.

3dly, It may be ſaid, and with truth, that a greater liberality now exiſts in reſpect of transferring choſes in action and poſſibilities, than did at the time of enacting the ſtatute of uſes, and hence a variation might ariſe. The anſwer is, that the Legiſlature, as evidenced by the act of pretenſed titles, ſubſtantially ſimilar to the Britiſh act on the ſame ſubject, ſtill conſider ſuch transfers as proper to be prohibited. We cannot argue from this ſource therefore further than the juſt conſtruction of their words will warrant.

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4. But the great argument is deduced from the conſequences which would enſue from adhering to the ancient doctrines onthis ſubject Admitting that theſe conſequences may be injurious on one ſide, eſpecially in a young country where vaſt tracts of land are ſtill uncleared, and in relation to which there may be a difficulty in tracing the poſſeſſion, I am not prepared to ſay, whether equal or greater inconveniences would not reſult, from retracing the policy of the law in reſpect of maintenance; admitting an unlimited right of transfering poſſibilities and rights in action in relation to lands; and loſing ſight of that poſſeſſion which is deemed by the common law an eſſential link of title.

As to going into theſe conſequences, and departing from the letter and ſpirit of the act and principles of the clauſe now before us, I diſclaim the power, and leave the ſubject to the wiſdom of another department.

I have ſaid that nothing in the caſe of *Duval* vs *Bibb* goes to diſpenſe with ſtatutary as well as actual poſſeſſion. This opinion accords with my own ideas of the deciſion at the time, and is not ſhaken by a deliberate conſideration of Mr. Call's report of that caſe. It is true, the report is rather indiſtinctly expreſſed, but its meaning may be clearly eviſcerated. It is important that in that caſe there was a ſtatutory poſſeſſion in Graves: It is a ſound rule of conſtruction, that the meaning of doubtful or ambiguous expreſſions is to be determined by reference to the actual caſe to which they were applied. Let us not looſe ſight of this ſtandard in the caſe before us. It is alſo important that although for diſtiction ſake I uſe the term ſtatutary in oppoſition to *actual poſſeſſion*, that poſſeſſion is of high dignity under our act, being equal to one transfered by livery of ſeizin. In the very caſe now in queſtion it was held to merge andextinguiſh the actual poſſeſſion of *Bibb*, who had

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holden as terretenant for more than 20 years before the deed to Graves, and who ſtill held; judgment was given againſt Bibb notwithſtanding his poſſeſſion for the premiſes in queſtion. This could not have been done, as 20 years gives a title in ejectment, if Bibbs poſſeſſion had been adverſe in reſpect of Graves. In truth it was deemed to be Grave's poſſeſſion: A ſtatutary poſſeſſion indeed, inſtead of an actual one.

This deciſion has exalted the dignity of ſtatutory poſſeſſion to its proper level. It goes to give to a conſtructive poſſeſſion exiſting in the bargainor at the time of the conveyance, the ſame effect as an actual poſſeſſion. It gives to the ſtatutary inveſtiture an equipollent effect with an inveſtiture by livery of ſeizen. All those expreſſions in the reported caſe, importing that Graves was out of poſſeſſion, only mean that he had not the actual occupancy. They do not import that he had not that ſpecies of poſſeſſion which is confered by the operation of the ſtatute; and which in this caſe was powerful enough to overrule the actual occupancy of Bibb. Such was clearly the meaning of the Preſident in this part of the report, "Whether a perſon out of poſſeſſion can convey his "title by bargain and ſale, or any other ſtatutary "conveyance? Seems ſettled by deciſions in Eng"land under their ſtatute of uſes: And our act of "Aſſembly page 167, in conformity to thoſe de"ciſions has added a clauſe, not in the ſtatute of "uſes, that thoſe conveyances ſhall transfer the "poſſeſſion to the uſe, as perfectly as if the bar"gainee had been enfeoffed with livery of ſeizin "of the land conveyed." In my ſenſe of this ſubject, the Engliſh deciſions warrant the poſition; they give to a ſtatutary poſſeſſion in the bargainor the effect of actual poſſeſſion. That effect exiſting under the ſtatute of uſes is corroborated here by the emphatical words of our act importing its equivalence with livery of ſeizin. In this view the Preſident was correct; but that able and correct

judge would never have said that a bargainor, having no manner of possession, could convey a title under the statute of uses: Every Tyro in the common law knows the case to be otherwise. Tabb, *vs* Baird.

Thus much for the report itself: The memorandum of the reporter must be understood in the same sense. Every thing said in court, and out of court upon the subject, had relation to the existing case; and I am clearly of opinion that the ambiguity on this subject has only arisen from using the words *out of possession* in their vulgar, instead of their legal, sense.

Thus considering and understanding that case, I trust I stand entirely acquitted for giving this explanation of it, and for believing it does not reach the point now before us.

In the case before us, Blow, the bargainor of the appellant, is not found to have had even a constructive or statutary possession, as Bibb was. The contrary is rather inferable from an expression in his (Blows) deed: Which describes the lot *as now properly belonging to him*, thereby rather excluding an idea of that possession in Newsum, which would have resulted to him by operation of law, had Newsum himself been possessed.

This view of the subject in my opinion decides the cause in favour of the appellants. It is therefore unnecessary to discuss the particular question, made by their consel, before alluded to. I would say however if it were necessary, that it is too rigid a construction of the deed under which the plaintiffs claim, to adhere merely to the emphatical terms relied on "*as the run now meanders;*" and reject the other words in the same deed describing the land, as being all that tract purchased from Newsum &c. The construction of a deed shall be made upon a consideration of all its expressions of description; besides these emphatical terms (as

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they are called) were probably taken from the deed under which the bargainor claimed, as a part of the description of the land, and if so were not meant to be tied down to the actual period of the date of the deed in question.

I am therefore of opinion that the judgment of the District Court is erroneous, and ought to be reversed.

FLEMING Judge. It is unnecessary to discuss this subject at length, as the question turns upon the right of possession altogether; for the person in possession has a right to hold, until a better title is shewn. Here Baird claimed the premises from Blow, and he from Newsum; but no seizin or title is found, either, in Newsum or Blow: Of course the latter had none to convey to Baird; who therefore has shewn no title to recover against the tenant in possession, whose right is *prima facie* paramount to any other; and cannot be disturbed, as before observed, except by one shewing a better title. Consequently, I am of opinion that the judgment is erroneous, and ought to be reversed.

CARRINGTON Judge. Whatever opinion I might have entertained upon the main question made in the cause, it is unnecessary to declare it, as the plaintiff, in the District Court, has shewn no right of entry in himself. For, to enable him to recover, he ought to have shewn a better title to the premises, than the tenant in possession had: But this he has not done. He has produced a deed from Newsum to Blow, under whom he claims: But he has not shewn that Newsum had any title, or that he ever was seized, or possessed in any manner whatever. The case, therefore, differs from that of *Duval* vs *Bibb*: For, in that, Bibb, the person under whom Graves claimed, was found to have been in possession for more than twenty years next before the date of the conveyance; and consequently there could be no doubt, but

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that the ſtatute transfered the poſſeſſion to Graves; who might therefore convey it to Duval: But here neither title, or poſſeſſion, is found in either Newſum or Blow; and of courſe the plaintiff could not derive either, under the conveyance to him by the latter. Therefore, without entering into the general queſtion, but obſerving only, that the argument, founded on the act of Aſſembly againſt buying and ſelling pretenſed titles, appears to me to have nothing to do with the caſe, (ſince it merely creates a penalty, and does not affect the right,) I am of opinion that the judgment of the Diſtrict Court is erroneous, and ought to be reverſed.

LYONS Judge. No ſeizen or right of poſſeſſion is found in either Newſum or Blow: Conſequently the plaintiff could derive no title under either of them. I concur, therefore that the judgment ought to be reverſed.

The judgment of the Court was as follows:

"The Court is of opinion, that the ſaid Diſtrict Court ought not to have permitted the deed from Blow and wife to the ſaid Baird, in the bill of exceptions ſtated, to go to the jury as evidence to ſhew that the ſaid Baird had a legal right to the land in diſpute, unleſs it had been alſo proved, that the ſaid Blow, or thoſe under whom he claimed, had ſuch a poſſeſſion thereof, as would enable them to convey and tranſfer a legal title to the ſaid Baird, by deed of bargain and ſale, under the fourteenth ſection of the act of Aſſembly entitled, *An act for regulating conveyances*, and that the ſaid judgment is erroneous, Therefore, it is conſidered, that the ſame be reverſed and annulled, and that the plaintiffs recover againſt the leſſor of the defendant their coſts by them expended in the proſecution of their writ aforeſaid here: and it is ordered, that the jury's verdict be ſet aſide, and that a new trial be had in the cauſe; and that on ſuch trial, the court do not allow the ſaid deed to go to the jury as evidence of the legal title, without ſuch proof as aforeſaid."

HALL,
against
HALL.

If the title of the heir be abated by a ſtranger, he cannot deviſe it, before entry.

IN ejectment brought by William Hall againſt Mary Hall, the parties agreed a caſe ſtating, That William Hall obtained a patent from Lord Fairfax, on the 21ſt of May 1751, for 582 acres of land; and entered on, and was ſeized thereof as the law directs. That he deviſed the ſame to his ſons Thomas and Joſeph for life, with remainder to their eldeſt ſons and their heirs, but, if no male iſſue, to their eldeſt daughters.

That the ſaid William Hall died on the 10th of November 1764, leaving ſeven ſons, to wit, William, the eldeſt, James, Richard, John, Anthony, Thomas and Joſeph; and four daughters Elizabeth, Ruth, Hannah and Sarah. That, at the time of making the will neither the ſaid Thomas, or Joſeph were married, or had iſſue. That Joſeph died on the 1ſt of January 1797, without iſſue, but leaving a will, whereby he deviſed an eſtate for life in 396 acres of the ſaid land, to his wife, who entered, and has been ever ſince poſſeſſed thereof. That William Hall the eldeſt ſon and heir at law as aforeſaid, by deed of bargain and ſale, dated the 17th of October 1797, granted to his ſon William Hall, the ſaid tract of land, *and the undivided. or divided moiety thereof.* That, after the death of William Hall the elder, his ſons Thomas and Joſeph divided the ſaid lands, and they and thoſe claiming under them have held their reſpective allotments ever ſince. And if upon the whole matter the law was for the plaintiff, judgment was to be entered for him as to *one moiety of the land devised to Joſeph and Thomas, being the lands in the declaration mentioned;* otherwiſe judgment was to be entered for the defendant. The Diſtrict Court gave

judgment for the plaintiff; and thereupon the defendant appealed to this Court.

Hall, *vs.* Hall.

RANDOLPH.—The ſpecial verdict does not ſhew that a partition was ever made; for there can be no partition, between jointenants, without deed, *Co. Litt.* 169: and the verdict does not find that any deed was actually made The teſtator could not have contemplated the remaindermans coming into poſſeſſion, earlier than the death of both jointenants; and he had a right to give his eſtate as he pleaſed,

STEUART *contra.* The verdict finds a partition; and that muſt, neceſſarily, be taken to mean a legal partition. Beſides, by the act of 1786, jointenants are made tenants in common; and of courſe the plaintiff repreſented his anceſtor. The title could not be in abeyance, but muſt have been in the heir at law.

RANDOLPH. The verdict only finds that there was a *diviſion*, and not a partition. Of courſe the anſwer given, on the other ſide, does not avail. The eſtate ought to be conſidered as an eſtate *pur autre vie*; and then the doctrine of occupancy takes place. This conſtruction may be made, as it is the caſe of a will, although it might have been otherwiſe in the caſe of a deed.

Cur. adv. vult.

ROANE Judge. In this caſe William Hall the Bargainor, in the deed of October 1797, had either a right to recover, the premiſes, in the event which has happened of Joſeph Hall's having died without children, or he had not.

If he could recover, it would be as heir to old William Hall, and as a reverſion of the eſtate in queſtion.

Hall, vs Hall.

If he could not recover, then judgment ſhould have been given for the defendants, upon the merits of the title.

But if he himſelf could recover, it ſtill remains to inquire, whether his bargainee, the leſſor of the plaintiff, can recover, the bargainor not having entered after Joſeph's death; but, on the contrary, the appellant being found to have been in poſſeſſion ever ſince his death?

This queſtion then is that decided in *Tabb* vs *Baird*, * unleſs a difference ſhall be ſuppoſed to arise from the difference of the ouſter in the two caſes. The ouſter, there, being a *diſſeizin*, and in this caſe, I conceive, an intruſion.

An intruſion is defined to be "an entry of a ſtranger after a particular eſtate of freehold is determined, before him in remainder or reverſion," 3 *Black.* 145.

I preſume, in this caſe, the appellant is conſidered as a ſtranger, although ſhe claims (and entered (under the will of her huſband.

But, in this ſpecies of ouſter, as well as diſſeiſin and abatement, an actual entry is neceſſary on the part of the deſſeiſed.

That entry not having preceded the conveyance in the preſent caſe, that convevance is not valid according to the deciſion of *Tabb* vs *Baird*. The conveyance was of a mere right of entry. During the life of the particular tenant, his poſſeſſion was the poſſeſſion of the reverſioner; but, upon his death, and the intervention of the poſſeſſion of a ſtranger, the caſe was altered.

I muſt therefore, in this point, give judgment, in this caſe, againſt the preſent appellee, although I think, at preſent, that the merits of the title are in his favour.

* *Ante.* 471.

I am of opinion that the judgment of the District Court ought to be reverſed.

Per Cur: Reverſe the judgment.

Wartenby, *vs.* Moran.

WARTENBY, *againſt* MORAN.

IN ejectment by Tibbs on the demiſe of Blair Moran and Richard Wells againſt Wartenby for a lot of land, the jury found a ſpecial verdict, which ſtates, That Charles Prather and wife, by deed of bargain and ſale, conveyed to Edward and Blair Moran *in feeſimple;* which deed, dated the 11th of December 1790, they find in *hæc verba*, and it contains a clauſe that the grantee ſhould pay a yearly rent; with a clauſe of reentry for non payment of the rent, *after demand made upon the premiſſes*, if no effects to diſtrain could be found. That the grantees entered and were ſeiſed until Oct. 15 1792; when Edwd. died, leaving the plaintiff Moran his heir at law; and Blair continued in poſſeſſion of the premiſes, until the 16th of the month; when no rent having ever been paid, and no effects to diſtrain found upon the premiſes, Prather entered thereon, and demanded the rent, and for failure in the payment thereof, and for want of goods whereof diſtreſs could be made, he made an actual entry on the premiſes, and continued poſſeſſed until the 1ſt of June 1795: When he conveyed to Robins, who entered, and was poſſeſſed, until July 6, 1795, when he conveyed to Wartenby the defendant; who entered and was poſſeſſed until the leaſe, entry and ouſter in the declaration mentioned. That upon the 11th of December 1796, the plaintiff Moran conveyed, in fee, to the plaintiff Richard Wells. That Prather obtained a patent for 451 acres (of which the lot in the declaration mentioned is part;) and on the 10th of March 1798 the ſaid Richard Wells entered on the premiſes, and made a leaſe for ten years to Tibbs, who entered on the 11th of that month,

If a grant be made, reſerving a yearly rent, with a condition that the grantor may re-enter if the rent be not paid, and no property is found on the land, whereof diſtreſs can be made, the grantor, upon demand made, and failure to pay, no property to diſtrain being found on the land, may reenter, and grant over to another,

Wartenby, vs. Moran.

& was poſſeſſed until the 18th, when he was ejected by the defendant. The Diſtrict Court gave judgment for the plaintiffs; and thereupon the defendant appealed to this court.

WICKHAM for the appellant. Prather's title is not found; but it is ſtated, in the verdict, that he obtained a patent from the commonwealth. The ſuit is brought by two perſons claiming different rights: which cannot be ſupported. The entry of Prather for non-payment, renders all title under Moran void. The diſtinction, in the Engliſh books, is grounded on the non payment of the rent abſolutely: but here he may enter firſt, to diſtrain; ſecondly to hold, if he cannot find property to diſtrain: And as it is found that there is no property to diſtrain, the title under Moran is neceſſarily void. Although it be generally true that where both parties claim under the ſame perſon, neither ſhall attempt to impeach his title, yet that cannot be inſiſted on now, as the point is not left open, after the verdict. Wells never was in poſſeſſion, and Moran was diſſeiſed: Of courſe it is not like the caſe of *Duval* vs. *Bibb*,* where there was a conſtructive poſſeſſion. The verdict does not find the leaſe, entry and ouſter as to both, but as to Wells only.

WARDEN *contra*. Wells is entirely out of the queſtion, and his claim does not affect the caſe. Moran is the perſon, who claims title in the land; and the jury have found that the deed of bargain and ſale was in fee: of courſe the condition in the deed avails nothing, as the jury have taken the law of the caſe upon themſelves. The eſtate was turned into a tenancy in common, and deſcended according to the act of Aſſembly. The entry is not found to have been for the purpoſe of making diſtreſs: for it is only that he entered to demand the rent; and it was all done *uno flatu*. No previous notice was given; and therefore the grantee

* *Ante*. 362.

had no right to enter for the breach, at that time. Both parties claim from Prather, and, consequently neither ought to be allowed to impeach his title. The result is that judgment ought to be entered in favor of Moran.

Wartenby, vs Moran.

WICKHAM in reply. Moran was out of possession; and therefore the deed from him to Wells is void. The declaration is upon two different titles, which can not be maintained. The finding of the jury is confined to Wells and does not extend to Moran: for the verdict is taken upon the second count, which relates only to Wells's lease. The finding that Moran took a fee makes no difference; for still the whole deed is found, and the court are to decide upon the deed itself. But the finding is true; for Prather did convey a fee; but it was a fee upon condition, only. There was no occasion for any previous notice of the entry for distress: It is never done; and there is nothing, in the law, which makes it necessary. The objection that both claim from Prather ought to have been insisted on before the jury: and is unimportant now.

WARDEN. The entry was for the purpose of repossessing himself of the estate; and therefore notice was necessary.

FLEMING Judge. There is certainly nothing in the argument of the appellees counsel, that the jury have found that the conveyance from Prather to Moran, was without any condition; because the deed is found *in hæc verba*, and contains the condition.

The question then is, whether the re-entry was lawful? The verdict expressly finds, that no rent had ever been paid; that Prather made a demand; and that, there being no property on the land, whereof distress could be made he entered for the non-payment: Which brings it exactly within the

Wartenby, vs. Moran.

terms of the condition; and, therefore, the grantor had clearly a right to re-enter.

There is no ground for the objection that notice ought to have been given that a re-entry would be made; becauſe the law requires no ſuch notice to be given; for upon the demand of the rent, and no property found to diſtrain, the right of re-entry attached. 6 *Bac. abr.* 29. 2. *Roll. ab.* 427. 7 *Co.* 29. *Litt. ſect.* 233.

As both parties claim under the ſame title, unleſs the plaintiff ſhews a better right, there is no ground to impeach the poſſeſſion of the defendant.

And, upon the whole, I am of opinion that Prather had a right to re-enter and poſſeſs himſelf of his former eſtate; and that his deed to Robins was valid: Of courſe, Wartenby, who claims under him, and is now in poſſeſſion, has the better title; and therefore the judgment of the Diſtrict Court ought to be reverſed.

CARRINGTON Judge. The verdict finds that the rent was not paid; that it was demanded; and that there was no goods upon the premiſes, whereof diſtreſs could be made: Of courſe, by the expreſs terms of the condition, the bargainor had a right to re-enter. There is nothing in the objection that no title in Prather is found; for as both parties claim under him, the one in poſſeſſion ought not be diſturbed, unleſs the other can ſhew a better right. I am therefore of opinion that the judgment of the Diſtrict Court ought to be reverſed.

LYONS Judge. The demand of the rent, with the non payment, and want of property, on the premiſes, whereof diſtreſs could be made, are expreſsly found by the jury: Of courſe the right of entry accrued by the expreſs terms of the deed: and therefore the judgment of the Diſtrict Court ought to be reverſed.

HARVEY,

against

PRESTON.

The time of the return of the ſurvey into the office is the period from whence the 6 months are to be calculated for entering a caveat; in ſuch a caſe, the caveatee muſt ſhew the fact.

A caveat lies as to an incluſive ſurvey although there be no certificate from the county court that it is reaſonable.

The act of Aſſembly concerning incluſive ſurveys does not extend to lands held by entry only.

No entry can be made under a warrant which is exhauſted by prior entries.

If a patent be iſſued by the Lt. Gov, it will be preſumed that the Gov. was abſent &c.

Damages are not to be given upon affirmance of the judgment in caſes of caveat

HERVEY entered a caveat againſt a patent to Preſton for 950 acres of land in the county of Botetourt; which was ſurveyed for Preſton upon the 15th of December 1793, under an order of Botetourt court, granting him leave to comprehend his ſeveral adjoining claims in one ſurvey; becauſe Harvey claimed part thereof by an entry of the 15th of April 1785 for 250 acres; of which 187 acres were ſurveyed on the 3d of June 1785, & a patent obtained therefor on June 11th 1787. The jury find Harveys entry, ſurvey and patent; as alſo the ſeveral entries of Preſton, with his incluſive ſurvey; They, likewiſe find, that the incluſive ſurvey contained part of Harveys ſurvey; *that the laſt courſe, but one, of Harveys ſurvey, was never actually run;* that Preſton, when he made his incluſive ſurvey, knew he was upon the land claimed by Harvey, whoſe entry he ſuppoſed to be vague and illegal. The Diſtrict Court gave judgment in favor of Harvey; and thereupon, Preſton appealed to this Court.

RANDOLPH for the appellant: There ought to be a venire facias *de novo*. By the the reviſed Code 156, any perſon, having a ſurplus within his boundaries, may apply for a reſurvey. The caveat has been entered prematurely; for it is before the county court had given judgment upon the return of the reſurvey; which has the effect of ſubjecting us to coſts, which we ought not to bear. Another reaſon is, the Lieutenant Governor could not iſſue a patent, unleſs it appeared that the Governor was abſent &c. but nothing of that kind is ſhewn in the patent. A third reaſon is, that the ſurvey is not correct; *for the laſt courſe but one, is not found to be run*; and the

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omiſſion might have made a great difference in the quantity of the land, as well as in the courſe of the lines; which may thereby have been rendered altogether uncertain. The failure therefore is a fatal objection.

WICKHAM *contra*. There is no occaſion for a *venire de novo*; for the reſurvey is in the record. Beſides there is an agreement to diſmiſs the caveat in the county court, and to enter it in the Diſtrict: where a ſurvey, was by conſent, ordered in the ſame manner as if it had been continued in the county court: which obviates every objection made. The verdict finds that a patent was granted to Harvey; which implies that it was iſſued rightly. But if there was no patent, ſtill we have a ſurvey; which is ſufficient to ſupport the caveat. The ſurvey is accurate enough; for the ſmall miſtakes in the original ſurvey will not affect the caſe; as the laſt ſurvey, under the order of court, has rectified them, and made every thing certain.

Harvey's is the better title. Preſtons old ſurvey does not interfere with Harveys entry; he withdrew part, and ſurveyed the reſidue. This ſurvey purſued the entry, although the jury find it did not touch the outward lines of it. All the lines are eſtabliſhed, except the miſtakes at the corner D: But the jury intended to ſay theſe are the corners meant; and that the lines and corners are included in Harveys ſurvey and grant. The land then being identified, ſmall miſtakes will not vitiate. *Herbert* vs *Wise*, and *Shaw* vs *Clements*. 1. *Call*. 438. The jury by eſtabliſhing our corners, in effect have ſaid that the plat contains our land. The laſt line but one, not having been run will make no difference, if there were *data* enough to aſcertain it. The line is a ſhort one, and might have been laid down without the aid of a chain. *Stever* vs *Gillis*, in this Court, * the other day, *Pl. Ed. Rev. Cod.* 148.

* *Ante* 417.

Preſton's claim is not well founded. He calls for our ſurvey, which he cannot tranſcend, as he muſt take our lines as his own limits. His entry, beſides, is without any warrant; for the whole was appropriated by others before that was made. But he did not hold grants for adjoining tracts: For he had entries merely; and the courſes were uncertain: But it muſt be ſhewn that the lines actually adjoin, before the party is intitled to an incluſive patent. In making the ſurvey they went upon our land, knowing the fact to be ſo; which is a very material circumſtance. Harvey, vs. Preſton.

RANDOLPH in reply. Preſton has not ſhewn a title; but neither has Harvey, and that is a good reaſon for a *venire de novo*. The two leſſer warrants are diſtinct from that for the 8000 acres. There ought to have been a reſurvey, and therefore the caveat was premature. The ſurvey in the Diſtrict Court has not been returned into the regiſters office within the ſix months, and that is a full anſwer to the proceedings in that court. But if Harvey ſhews no title, he had no right to caveat our patent: and therefore the judgment ſhould be in our favour, upon the merits. Beſides, the jury expreſsly find, that there are miſtakes in the courſes and diſtances; for the eſtabliſhment of the corners, ſpoken of on the other ſide, is predicated upon the laſt ſurvey, and not upon the original. As one line was not run, the circumſtances are neceſſary to be known, in order to aſcertain whether the omiſſion has given Harvey more than he was entitled to. The patent ought to have ſhewn that the Governor was abſent. It is not true, that calling for Harveys lines admitted his right; for it was only a ſort of index by which he might make his entry certain. A man may have an incluſive patent for an entry, as well as a grant.

WICKHAM. If it is clear that Harvey had a title, why award a *venire de novo*, when it is evident that Preſton has no claim? The parties a-

Harvey, vs Preſton.

greed to relinquiſh the benefit of the county court proceedings, and therefore it was unneceſſary to await a judgment there. Of courſe a *venire de novo* can never change the caſe, and therefore it would be uſeleſs to award it; eſpecially as it appears that Preſton had no claim, *Davis* vs *Miller* 1 *Call*. The laſt ſurvey corrected all the miſtakes in the firſt, and the jury expreſſly refer to it. There muſt be a grant, or there can be no inclusive patent; for the word reſurvey, in the act, evidently ſhews, that a prior ſurvey muſt have preceded.

RANDOLPH. It was neceſſary that the proceedings in the county court ſhould have gone on, and be known, in order to aſcertain whether Preſton had a title: Which was hindered by the premature caveat. If the proceedings in the county court were to be ſubſtituted by thoſe in the Diſtrict Court, ſtill a judgment ought to have preceded a caveat; and therefore the conſent, ſpoken of, is no anſwer to the objection.

Cur adv. vult.

ROANE Judge. This is a caveat, by the appellee, againſt a grant under an incluſive ſurvey, of the appellant, of December 1793: The object of it is, to protect the appellees title to 187 acres (now found to be 219 acres,) which he claimed by patent of the 11th of June, 1787, founded on an entry and ſurvey prior to that of the appellant.

On the merits Mr. Randolph ſeemed to yield the cauſe, but contended that a *venire de novo* ought to iſſue.

It is certain, on thoſe merits, that the judgment of the Diſtrict Court is right; for the land A, B, C, D, E, F, G, A, is interlocked under the two titles; and that of the appellee is prior, and complete; whereas, that of the appellant is defective.

But it is said, that the caveat is premature, as not shewn to have issued within six months, after the survey. The answer is, that the time of its return into the office is the period, from which the limitation is to be computed. This time is not shewn in the present case. Perhaps the law is directory, to the register, in this instance; and if the appellant means to take advantage of such an objection, he ought to have stated facts to support it.

It was also said that being an inclusive survey, no caveat lies; because there is no certificate, by the county court, that the resurvey is reasonable. I think, on the contrary, that if a caveat lies notwithstanding such certificate, it lies *a fortiori* where the certificate has been omitted.

I think the act authorising inclusive surveys does not extend to lands held by entry; If so, as no separate survey was made on the appellants entry in question, a grant could not issue therefor: But probably no survey whatever, even independent of the appellees title, would have availed, as the entry of the appellant for 150 acres, is found to have been made upon a warrant, which has been exhausted.

But it is said, that this is a caveat on the ground of a better right; and that none is shewn, inasmuch as the patent is by the lieutenant Governor, without stating the absence of the Governor &c. The ground of this caveat being so, is perhaps an answer to Mr. Wickhams idea that we ought to extend the judgment to prevent any grant (even for land not claimed by the appellee) from issuing. It seems to me that the judgment in such case should be merely co-extensive with the *better right* which is set forth as the ground of the caveat. With respect to the objection to the grant, as above mentioned, I presume that the ground of our decision on a similar point in *Harvey & wife* vs *Bor-*

Harvey, vs Preston.

den gets over the objection. We shall not readily presume that an officer (and the second magistrate of the Commonwealth) has acted in a case where it is illegal for him to do so.

I see no reason for a *venire de novo*; and think the judgment of the District Court should be affirmed.

FLEMING Judge. I am of opinion that there was not the slightest ground for the appeal; and therefore think that the judgment ought to be affirmed.

LYONS Judge. Concurred that the judgment ought to be affirmed.

Judgment affirmed.

On entering the judgment a question was made by the clerk whether it was to be affirmed with damages?

WICKHAM. A caveat is a real action; and therefore damages may be given.

RANDOLPH. Real actions existed before caveats: and therefore that term does not apply to them. In practice they never have been considered as real actions; and therefore only 50*s* is taxed for the lawyers fee.

ROANE Judge, In the case of *the Auditor* vs *Graham* * the court considered motions included under the terms *suits* and *actions*. This construction holds a *fortiori* as to caveats; which are less summary; in which the ground of complaint is required to be specified; and when facts, not agreed by the parties are to be settled by a jury. The term *Real actions* certainly comprehends them; and the omission of inserting caveats in the same

* 1 *Call* 475.

clauſe with controverſies concerning mills, roads &c. with which they were uſually coupled, could only have ariſen from a ſuppoſition that they were comprehended under the general term. There is the ſame reaſon for extending damages to them, as to thoſe proceedings; and it ought not to be deemed, that they were omitted in order to be provided for, without reaſon; and when the words are ſufficiently extenſive.

FLEMING Judge. The caveat is a kind of equitable proceſs; and therefore damages, which are a penalty, ought not to be given, unleſs the act of Aſſembly had directed it.

LYONS Judge. A caveat appears to me to be like an injunction, and therefore to be governed by equitable rules. This idea is confirmed by that part of the act, which directs that the court ſhall have power to give coſts, or not, according to circumſtances: For the damages are like coſts: Both are penalties; and, when exerciſing an equitable juriſdiction, penalties are never inflicted, by the court, unleſs they are, expreſſly, directed by the law. I think therefore that damages are not recoverable in this caſe.

The judgment was accordingly affirmed with coſts; but without damages.

HARRIS,
against
MAGEE.

If the answer denies imposition, and is supported by the report of the commissioner and the acknowledgments of the plaintiff that the debt is just it will not be set aside by loose conversations

A contract will not be suspended, until a tort is tried.

In an order of reference to the commissioner to take an acccount between the parties; all accounts between them ought to be settled.

HARRIS brought a suit in chancery to be relieved against a contract with Magee for the purchase of £300 worth of merchandize; which the bill states Magee was to furnish from Philadelphia, *at the lowest rate* they could be purchased at from the wholesale dealers, there, and Harris was to give him Virginia currency for Pennsylvania money, equal to advance of 25 per cent; the money to be paid in three months, and to be secured by deed of trust. The bill charged that the goods were over priced, and that the plaintiff, who is illiterate and cannot read, had been imposed upon. The answer denies the imposition; and states, that the plaintiff solicited the defendant to furnish him with goods; that he purchased them in Philadelphia, and shewed the real invoice to the plaintiff; who took such as he liked only, at agreed prices. The Court of Chancery referred the account between the parties to a commissioner, who reported, that the prices charged were agreeable to the invoice. There are several depositions taken relative to the terms of the contract; and the prices of the goods. The Court of Chancery dismissed the bill; and Harris appealed to this court.

WICKHAM for the appellant. The contract between Harris and Magee ought to be set aside upon the ground of fraud. Harris was illiterate, and forced in the execution of the agreement. The latter states the contract perhaps truly, but it contains other assertions which are disproved by the record; and threats are held out in it in order to intimidate him. The prices of the goods are so enormous as to carry internal evidence of fraud. Coarse woolens are charged at 150 per cent, although 87½, or 100 per cent at the highest, is the most ever given for them. Mere inadequacy of

price may not be sufficient, of itself, to avoid the contract, but inadequacy combined with other circumstances will, *Heathcote* vs *Paignon* 2 *Br. c. rep.* 174. The real agreement was for the invoice price, and a reasonable advance for the purchase; but this was departed from, and he was threatened, by the letter, in order to procure a compliance. A great part of the goods were old, and there were a good many remnants. It is in principle like the case of *M'Call* and *Broddus* in this court. The answer is disproved by Richardson and Harris; but, independent of that, its credit is destroyed by the conduct of the defendant. Farris was interested, and privy to a fraud: therefore his testimony is of no weight. It does not appear that the invoice is genuine except from the answer; for it is not signed by the merchants, who sold the goods. The contract ought to be set aside, and the value only given. Magee prevented Harris from selling the cattle, whereby he sustained an injury, which ought to be compensated; and, for that purpose, an issue ought to be directed. Upon the whole, the fraud is not only apparent from the circumstances, but the contract carries internal evidence of the deception along with it.

Harris, vs. Magee.

RANDOLPH *contra.* The plaintiff executed a deed, which closed the whole transactions, and was a deliberate act, not subject to any reasonable exception; for there is nothing which proves that any fraud was used in order to obtain it. Most of the allegations of the answer are responsive to those in the bill; and therefore they must be disproved according to the usual course, or the general rule of evidence, relative to the weight of an answer, must prevail. Besides, they are supported by the statements in the report of the commissioner. There is no proof of fraud; and the plaintiff must prove it, before he pretends to draw any relief from that source. Mere ignorance, if it exists, is no ground of relief, unless there is proof that advantage has been taken of it. The threats

Harris, vs. Magee.

ſpoken of, are nothing more than a mere demand of juſtice; which certainly is no ground of objection. There is no internal evidence of fraud. The advance upon the invoice is not unreaſonable; for calculation will ſhew, that 100 per cent was given by Magee; and therefore the compenſation which he demands, conſidering the riſque and expenſe of tranſportation, is not extravagant. The ſuppoſed inadequacy has no influence. The caſe of *Heathcote* vs *Paignon* does not apply againſt the defendant; for no overreaching or fraudulent conduct was uſed there: Much leſs any diſtreſs, or force. No exception to the old goods was taken in the bill, or any other proceedings in the Court of Chancery; nor is any teſtimony taken in order to diſprove the invoice. There is no evidence that Farris was intereſted; nor that he was privy to a fraud; for no fraud is proved; and conſequently there is no ground for exception to the weight & credit of his teſtimony. The idea of the iſſue is wholly untenable; for Magee had a right to interpoſe, and forbid the ſale. Exceptions, not taken in the Chancery, as to matters of fact, ought not to be allowed to be taken here; becauſe it tends to ſurprize the adverſary party. The decree therefore is right in all its parts, and ought to be affirmed.

WICKHAM in reply. The plaintiff could not read; and therefore ſhewing him the invoice was uſeleſs, and proves nothing in favour of the defendant, even were the fact itſelf eſtabliſhed. The commiſſioners report is not teſtimony, any further than it is ſupported by the proofs in the cauſe; and therefore, the argument drawn from that ſource, is not ſuſtainable. The advance of 150 per cent was altogether unconſcionable; it ought to have been the uſual advance, which would have been 25 per cent only, as the Philadelphia wholeſale dealers buy of the manufacturers inſtead of the merchant; and therefore can ſell them at an advance of Virginia currency for Pennſylvania currency. The invoice prices were actually excepted to in

the Court of Chancery; and therefore, according to the oppoſite counſels own argument, he ought to have proved them. Harris, vs. Magee.

Cur. adv. vult.

LYONS Judge. The firſt objection to the decree is, that no deduction is made from the price of the goods; which it is alledged ought to have been done, as the plaintiff was impoſed upon, and the goods were over priced. But both charges are expreſsly denied by the anſwer; which is ſupported by the report, and the acknowledgments of the plaintiff that the debt was juſt; againſt which the plaintiff has nothing to oppoſe, except looſe converſations, and conjectures; which certainly cannot outweigh the united force of the defendants teſtimony.

The next objection is, that no allowance is made for the injury done the appellant, by M'Gees forbidding the ſale of his eſtate: Which is certainly a novel idea: For if there had been any ground for the ſuppoſed injury, when was it ever heard that the execution of a contract was to be ſuſpended, until an iſſue relative to a tort could be tried, ſo that the damages might be oppoſed as a diſcount againſt the debt? Upon this ground the court diſcover no error.

But, for another reaſon, they are of opinion, that the decree is erroneous; namely, that although there were ſeveral payments, and ſome miſapplications of credits; and the order of reference to the commiſſioner embraces all accounts between the parties, yet the commiſſioner has only ſettled the accounts relative to the deed of truſt; whereas he ought, agreeable to the order of reference, to have ſettled all accounts between them, ſo that the injunction might have been diſſolved, as to the true ballance only. Upon this ground therefore, the decree is to be reverſed, and a di-

Magee, vs. Harris.

fection given that a ſettlement of all their accounts ſhould be made by the commiſſioner.

The decree was as follows.

"This day came as well the appellant as the appellee John Magee, by their counſel, and on conſideration of the tranſcript of the record of the ſaid decree, and the arguments of the counſel aforeſaid; It appearing by the report of the Maſter Commiſſioner made in this cauſe, that payments had been made by the appellant, to the appellee John Magee, towards diſcharging the debt due to the ſaid appellee; for the ſecuring whereof the deed of truſt in the proceedings mentioned, was made to the other appellees, Thomas Hatton and Micajah Crew; and it alſo appearing by the receipts and other evidence in the cauſe, that further, and other payments had been made to the appellee John Magee, which are not credited in the account ſo ſtated by the Maſter Commiſſioner; This Court is of opinion, that all accounts between the parties ſhall be fully ſtated and ſettled by the Maſter Commiſſioner before a final decree; That then the injunction ſhould be diſſolved for the balance only, that ſhall appear on ſuch ſettlement to be due to the appellee Magee from the appellant, with intereſt until paid, and the injunction be made perpetual, as to the reſidue; and that the coſts in the Court of Chancery, be borne equally by the parties Harris and Magee. Therefore it is decreed, and ordered, that the decree aforeſaid be reverſed and annulled, and that the appellee John Magee, pay to the appellant his coſts by him expended, in the proſecution of his appeal aforeſaid here."

The following Caſes were reported by a Gentleman high in practice at the time; and by whoſe permiſſion they are now publiſhed.

Cases

Argued and Determined

IN THE

COURT OF APPEALS

IN

JUNE TERM OF THE YEAR 1790.

PRESENT:
Edmund Pendleton, *Preſident.*
The Honorable
Peter Lyons, Paul Carrington, William Fleming, and James Mercer, *Judges.*

CRUMP, &c.

againſt

DUDLEY & Wife.

E. P. deviſes a ſlave to her daughter for life; and, if ſhe dies before my ſon J. P. then to be given to my ſon J. after which ſhe give the remainder part of her eſtate to be equally divided among her four children, T. J. M. & S. It ſeems that the remainder in the ſlave paſſes.

ELIZABETH PINCHBACK widow, purchaſed a ſlave named Sarah, and made her laſt will in writing dated in 1750 in the words following to wit, "And as touching ſuch wordly goods or other eſtate "wherewith it hath pleaſed the Lord to endow me "with in this life, I do give and diſpoſe of in manner and form following, Imprimis, I do hereby give "& bequeath to my loving ſon John Pinchback, all my "tract or parcel of land in Goochland county, being

The wife's conveyance of her property before marriage, was ſupported againſt the huſband.

Crump, vs Dudley.

"five hundred acres, and known by the name of the "Bird. Imprimis, I give and bequeath to my lov- "ing daughter Sarah Pinchback one negro girl named "Sarah (the slave in question) during her life, and "in case she dies before my son John Pinchback, then "the girl given to her to go to my son John. Im- "primis, I give and bequeath all the remainder of "my part of the estate to be equally divided "between my four children, viz. Thomas, John, "Mary and Sarah, but to be kept together till all "the debts are paid and then divided."

The testatrix departed this life soon after the execution of her will, and John Pinchback died in the lifetime of his sister Sarah, so that the contingent bequest of the remainder of the slave Sarah, to him, never took effect.

Thomas Pinchback the eldest son of the testatrix, departed this life leaving two daughters; of whom one was the appellee Anne, who in her infancy had resided with Sarah Crump, formerly Sarah Pinchback.

She continued unmarried until after she had attained the age of twenty one years, when she formed an engagement with William Dudley, which continued about twelve months. On the 12th of February 1773, the day after the license for the marriage had issued, and the day before it was solemnized, Anne Pinchback executed a bill of sale for her interest in the slave Sarah and her increase for the consideration of thirty pounds to Sarah Crump who held a life estate in the said slaves. This bill of sale was executed without the knowledge of William Dudley, but it did not appear that any caution had been given to the witness thereto to conceal it from him. The slaves had increased considerably, and a moiety of them was worth much more than thirty pounds. After the death of Sarah Crump, W. Dudley & Anne his wife instituted their suit in the Court of Chancery for a moiety of the said slaves, alledging that the reversion did not pass by the residuary clause in the will of Elizabeth

Crump, vs. Dudley.

Pinchback but descended on her eldest son Thomas, and from him to his two daughters, of whom the said Anne is one, and that her deed was in derogation of the rights of marriage. The Court of Chancery decreed a moiety of the slaves to the complainants; from which decree the executors of Sarah Crump appealed to this court.

John Taylor, for the appellants, assigned three errors in the decree of the Court of Chancery.

1. That, if the slave descended and the right of the appellees was unimpaired by the bill of sale of the 12th of February 1773, still the appellants were entitled to a share of the appraised value.

2. That Elizabeth Pinchback died testate as to her whole interest in the said slave: And,

3. That the appellee Anne had sold her interest, whatever it was to Sarah Crump, in 1773.

As to the first: This is plain upon the acts of 1705 *chap. 3d sect. 10*, and 1727 *chap. 4th, sect 8*: Which apply, as well to a partial, as to a total intestacy.

As to the second: Although it be a governing principle in the construction of wills, that the intention shall be observed, yet, in determining upon that intention the rules of law must be adhered to. 2 *Atk.* 5. 5. And it is a fixed rule of law that a remainder or reversion will pass by a general devise of the residuary estate.

Then suppose the testatrix, when making her will, had been asked, whether the remainder in the slave Sarah was undisposed of, and whether it was her intention that her residuary interest in the said slave should descend, as a reversion on her heir at law? Would she not have answered, that she had disposed of the whole of her estate, and died intestate as to no-

Crump, *vs* Dudley,

thing? If ſo, to decree the ſlave to the heir, will be to fruſtrate her intention.

As to the third: Whatever may be the opinion of the court on the other points, it is clear, that by the ſale of 1773 the right of the appellees was completely extinguiſhed.

At the time of the ſale, the appellee Anne had as perfect and complete a controul over her property as any other free perſon whatever. She was of full age, and poſſeſſed of every quality requiſite to the validity of a contract. Although this particular contract might not be known to Mr. Dudley, yet he married, knowing that his wife had poſſeſſed the ability to diſpoſe of her property, and was at full liberty to exerciſe it. This could not be unknown to him. Again, in order to ſupport his preſent claim, it ought to appear, that this property was an inducement to the marriage. But, ſo far from ſhewing this, it is not even alledged in the bill.

No fraud could be intended on the huſband; becauſe there is no ſecret or reſulting truſt for the benefit of the wife, or of any perſon ſhe might appoint; but it is a fair and *bona fide* ſale. If mere ignorance of contracts on the part of the intended huſband could ſet them aſide, property would be abſolutely bound and become unalienable, between a contract for marriage and its celebration. The inconvenience of which in long engagements is obvious.

This is a compromiſe of a doubtful right. The ſeller and the purchaſer each had claims to the thing contracted for. A compromiſe of this ſort is ſupported by the law, 1 *Atk.* 10. Suppoſe it to be the opinion of the court that the right was in Sarah Crump before the contract, could the appellees be decreed to refund the £ 30 with intereſt? Certainly they could not:— And if they could not, neither ought the court to interpoſe, if the right ſhould be conſidered as having been in the appellees. The contract, being binding on one party, ſhould be binding on both.

Crump, vs. Dudley.

It is not in proof either that Sarah Crump knew of the marriage contract, and notice is not to be presumed, 1 *Atk.* 175. If she had no notice, then she could have committed no fraud on the rights of the intended husband.

MARSHALL for the appellees. The acts of Assembly refered to by Mr. Taylor, apply only to cases of total intestacy. The words are, "when any person "dies intestate, leaving several children &c; and not when any person shall die intestate with respect to any part of his property. The distinction between a total and partial intestacy, which the law seems to have made, is not entirely without reason. A total intestacy is seldom designed. Where it is accidental, the justice and humanity of the law gives to younger children a share of the appraised value of slaves; altho its policy makes them descendable as real estate. But where a will is made, it can seldom happen that much property will be omitted, unless the omission be designed. If however, we suppose the provision of the law to extend to a partial intestacy, can the section be construed to extend to a possible reverter, as in this case? The slave is given in the will. If John had survived Sarah, the slave is given for ever. What is to be inventoried and appraised? Is it a mere possibilty? Is the heir at law to have a mere possibility inventoried and appraised, and to pay a proportionate value of that appraisement to the younger children? It is plain that the sections cited do not comprehend the case.

The slave did not pass by the residuary clause.

It is true, that in the construction of wills the rules of law must be adhered to; but it is not less true, that it has become a rule of law, to obey the plain intention of the testator. It is admitted that general words may in the residuary clause of a will pass a reversion, or remainder; but it is contended that such words will not pass such an interest, if there be accompanying words, shewing the intention of the testator to be, to limit the operation of the general

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words to a particular property. An effect has been given to such words in a will, which they have not in deeds, to promote, and not to frustrate, the intent of the testator. In the present case the will is obviously pen'd by a person not accustomed to legal forms. As one evidence of this, each sentence of the will commences with the word *Imprimis*. The writer, therefore, cannot be presumed to have known the legal construction of particular expressions, and to have intended that construction. It may well be doubted in such a case, even had there been no restraining words in the residuary clause, whether a mere possibility could be designed to pass by it; and that too in a thing before mentioned, and given away in the same will. But here are restraining words.

The property is to be kept together till debts are paid. It is to be then divided. How mix a mere possibility, such as this, with other visible and tangible estate? How divide it? Why keep it for debts when it could not be productive? To me it appears, obviously, to have been the intention of the testatrix, an intention evidenced by the descriptive words of the clause, to pass, by this residuary clause, only such property as could be useful in the immediate payment of debts, and as would be susceptible of immediate partition.

Marriage is to be considered as a civil contract. It is an union of fortunes, as well as of persons. It is of consequence to the happiness and peace of society that it should be fair, and without deception. A person possessed of a visible fortune, who contracts matrimony, impliedly contracts to unite that fortune as well as her person, to her husband. To dispose of it secretly is a palpable fraud; immoral in itself; and productive of consequences extensively injurious. It is a breach of the contract, and has been discountenanced by courts 1 *Eq. ca. ab.* 59. This case is stronger than those there cited, in as much as circumstances, not appearing in those cases, attend the transaction. The deed was executed the day before the

marriage, and therefore would not probably be known to the intended husband, until the ceremony should be actually performed.

It was executed to a person whose situation probably gave her an influence over the mind of the seller, which no other person possessed. It was for an estate not in possession, but expectancy; and therefore to be the more readily parted with, at an under value; and the consideration was so inadequate as scarcely to distinguish it from a gift.

It cannot be necessary to shew, by testimony, that fortune was an inducement to the marriage. It results from the nature of the contract, that the inducements to it are various; and that fortune is not to be excluded from its share in producing it. Of course it is not to be expected that other proof is to be adduced; since it is not to be expected that declarations, to that effect, could be made by a gentleman, who is endeavouring to obtain a lady's affections. That fortune is not stated in the bill to have been an inducement cannot effect the right; since the bill is drawn, not by the party, but by his counsel; and the existence of the inducement does not depend upon the statements of the bill, but grows, necessarily, out of the nature of the case.

Nor is it material that the court would not decree the appellees to refund if the right should appear to have been against them, independant of the contract. All unfair contracts bind the party who has committed the fraud; and yet the injured person may be relieved against them.

It is admitted that family disputes may be compromised, but the persons compromising them ought to be in a situation to part with their property. An unequal compromise is as objectionable, if not more so, as a sale on a very inadequate consideration: Of either, the intended husband, considering the time and circumstances of the case, ought to have been informed. It

Crump, v. Dalley.

would not have been withheld from him, had no fear exiſted of his preventing its completion.

The ſituation of the parties and the complexion of the caſe, renders it impoſſible, that Sarah Crump could have been ignorant of the intended marriage; nor is it pretended, by her repreſentatives, that ſhe could have been ignorant of it.

If then the acts directing ſhares of the appraiſed value of the ſlaves of inteſtates to be divided by the heir among the younger children, do not extend to the caſe: If the poſſibility of the reverter of the ſlave Sarah did not paſs by the reſiduary clauſe of the will of Elizabeth Pinchback. And if the ſale from Anne Pinchback to Sarah Crump was void as being a fraud upon the huſband; then the appellees, in right of the ſaid Anne as one of the coheireſſes of the ſaid Elizabeth Pinchback, are clearly entitled to a moiety of the ſlaves, according to the decree of the Chancellor; which ought to be affirmed.

The court gave no opinion on the firſt or ſecond point; but rather inclined to conſider the reverſion in the ſlave Sarah with her increaſe, as paſſing by the reſiduary clauſe of the will of Elizabeth Pinchback.

On the third point, the court was unanimous that the ſale from Anne Pinchback to Sarah Crump was valid; and therefore the decree of the Chancellor was reverſed, and the bill of the appellees diſmiſſed with coſts.

BEALL
againſt
EDMONDSON.

A new aſſumpſit, for a ſtore account barred by the ſix months act of limitations, binds the debtor.

THIS was a ſuit inſtituted, by Beall, in the General Court, for goods, wares and merchandizes ſold and delivered. The declaration being in the uſual form, an iſſue was made up on the plea of *non aſſumpſit*, and the following verdict was found by the jury,

We find for the plaintiff £. 61 : 18, if the expreſs *assumpsit* of the defendant, on the 10th day of March 1783, to pay for the goods, wares and merchandize in the declaration mentioned, which were delivered on the 20th day of July 1781, takes the debt out of the act entitled, "An act for diſcouraging extenſive credits and repealing the act preſcribing the method of proving book debts:" otherwiſe we find for the defendant.

The cauſe was adjourned to this court.

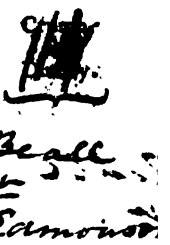
MARSHALL for the plaintiff. The act of 1779 is in fact nothing more than an act of limitations. The act of 1705, which is the general act of limitations declares, "that all actions of treſpaſs &c. ſhall be brought within the time therein after expreſſed and not after; that is to ſay, the ſaid actions upon the caſe &c. within five years next after the cauſe of ſuch action has accrued, and not after:" And the act of 1779 declares, that all actions or ſuits, founded upon account for goods, wares and merchandize ſold and delivered, or for any articles charged in any ſtore account, ſhall be commenced and ſued within *six months* next after the cauſe of ſuch action or ſuit, or the delivery of ſuch goods, wares and merchandize, and not after; except that, in caſe of the death of the creditors or debtors before the expiration of the ſaid term of ſix months, the further time of twelve months, from the death of ſuch creditor or debtor, ſhall be allowed for the commencement of any ſuch action or ſuit. The object and effect of each act is, to prevent the inſtitution of ſuits in certain caſes after a time, limited by the wiſdom of the legiſlature, ſhall have elapſed. In the operative words of the two principle clauſes which have been cited, there is little other diſtinction than the difference of time allowed for bringing the action. It will not be contended that a longer, or a ſhorter time, makes the act more or leſs an act of limitations. The leading and important diſtinction between

the two laws is, that the first must be pleaded, whereas the second is to be noticed by the court and jury, although the defendant should not seek to avail himself of it.

The latter law does not, for this reason, cease to be an act of limitations. If a similar clause had been introduced into the first law, it would have been an act of limitations notwithstanding. That clause does not affect the right of action: It only relates to the manner in which the subject, to be decided on, is to be brought before the court. But the decision of the court will be the same in the one case, as in the other. In a cause, depending on the latter law, which comes before the court without pleading the act, the court must decide precisely in the same manner as it would decide the same case brought before it by pleading, if the act had required that it should be pleaded. This clause in the act therefore does not change its character, or make it less an act of limitations. If it be, in essence, an act of limitations, then it will be admitted that the fresh assumpsit rescues this case from the operation of the act, as the suit was brought immediately after the new assumpsit was made. But whatever may be the opinion of the court on this point, the action is clearly maintainable on other ground.

The suit is instituted, not on the contract raised by the delivery of the goods, but on a new contract, for which the delivery of the goods was a sufficient consideration.

Altho the declaration is in the usual form, yet the assumpsit, laid in it, may be considered, either as an implied, or an actual assumpsit. Upon demurrer to the Declaration, or after a general verdict, it would be considered as founded on an express assumpsit, if it was necessary so to consider it, in order to support it: Therefore *a fortiori*, the declaration, in this case, where the verdict



ſhews a ſpecial aſſumpſit, well be conſidered as charging that ſpecial aſſumpſit. The ſuit, then, being inſtituted, not on the delivery of the goods, but on a ſubſequent agreement to pay for them; the only queſtion is, whether the conſideration, on which that agreement mas made, be ſufficient to ſupport it?

A moral obligation to do a thing is a ſufficient conſideration for an aſſumpſit, *Bull. ni. pr.* 147. Can a ſtronger moral obligation exiſt than to pay for property purchaſed?

No clauſe in the act does, or can, deſtroy this moral obligation; nor does any clauſe make it an unfit conſideration for a new contract. The act deſigned to prevent the inconſiderate incurment of debt, by taking up goods without enquiry; not to diſable the individual from making a contract upon a conſcientious conſideration. The act goes no further than to abſolve the debtor from the legal obligation created by the original purchaſe of the goods: It does not diſable him from making a ſubſequent contract concerning them. Caſes innumerable might be adduced, where a promiſe will bind a man to do that, which he was not bound by law to do before the promiſe was made. Money advanced to a ſon, without requeſt on the part of the father, is yet a ſufficient conſideration to give validity to a promiſe of the father to repay it. A debt barred by the act of limitations, is a ſufficient conſideration for an aſſumpſit: A bankrupt, whoſe legal diſcharge is as complete as it would have been had he never owed a ſhilling, will yet be bound by his promiſe, made after the bankruptcy, to pay a debt contracted before it.

J. TAYLOR for the defendant. The only queſtion is whether this aſſumpſit revives the claim, as in caſes under the act of limitations? It cannot revive the claim in like manner, becauſe the two acts are totally diſimilar.

They differ, 1. In title, 2. In the motives which induced their paſſage, 3. In expreſſion, 4. In the mode of being carried into effect.

1. The title of the firſt is "an act for limitations of actions and avoiding of ſuits."

The title of the ſecond is "an act for diſcouraging extenſive credits, and repealing the act preſcribing the method of proving book debts."

2. The object of the firſt act is to prevent the bringing of ſuits, when time had devoured the defence. The object of the ſecond is to prevent extenſive credit.

In the firſt caſe a freſh promiſe does away the miſchief. In the ſecond a freſh promiſe does not diminiſh it. The act will have made an immaterial change, in the nature of the evidence required, without affording in any degree, a remedy for the evil deſigned to be removed.

3. The expreſſions vary eſſentially. What is this ſuit founded upon? Is it not on goods, wares and merchandize ſold and delivered? The act proceeds further and ſays, "for any articles charged in any ſtore account" This is a ſuit brought for articles in a ſtore account; which articles form the conſideration of the promiſe. The act of limitations goes to the promiſe: This to the conſideration of the promiſe: There is a difference, too, ſhewn by the exception in favor of executors and adminiſtrators, proving that, in the contemplation of the Legiſlature, the act embraced every caſe, not excepted. The penalty, for poſtdating the items of the account, ſhews, likewise, the intention of the Legiſlature to reach the cauſe of the action: So too, the expelling from the account every article not delivered within ſix months.

4. The laws differ in their mode of execution. The act of limitations muſt be pleaded: This act

need not be pleaded. The act of limitations does not destroy the debt, but may, or may not, bar its recovery: This act destroys the debt itself; and therefore, need not be pleaded.

The object of the act would be defeated, if the plaintiff may elude it by proving a special promise. When must this promise be made? Suppose, a day after the delivery of the goods, promise of payment be made: If a suit be maintainable on it, the act will be of no avail, as it would be no discouragement to extensive credit. Such promises might always be obtained. The purchaser would never fail to give them on the delivery of the goods. No person purchasing goods would, if asked whether he would pay for them, answer otherwise, than in the affirmative. This might be proved as readily as the delivery of the goods; and the act would be for ever evaded. Casual inadvertant expressions would not fail to be seized on, as assumpsits, on which to found the suits.

The President delivered the opinion of the court.

The act prescribing the method of proving book debts, passed in 1746, and repealed by the act of 1779, will aid the court in the construction of the latter act. The act of 1748 begins by explaining the cases to which it applies, to wit, "all actions founded on *emisset* &c." If in such a case the plaintiff could support his action without his book, that act would have no application to it. But, if he could swear that the matter in dispute was a store account, and that he had no means to prove the delivery of the articles therein contained, or any of them, but by his store book, in that case the book or a copy of the account, wight be given in evidence. Thus was a store account admitted; and this forms the subject of the act of 1779. There were two evils to be removed by that act. The first, the act of 1748; which was to be repealed: The second, extensive credit; which was to be prevented. The

firſt evil was cured by repealing the law: See, then, the means which were uſed to cure the ſecond.

The act of 1748 brings the account into court, as neceſſary to ſupport the action; and the act of 1779 ſuppoſes it there. What are the words? "All ſuits founded on account for goods, wares "and merchandize ſold and delivered, or for any "artciles charged in any ſtore account." What is a ſuit founded on an account? Is it a ſuit on ſimple contract in oppoſition to bonds? Or is the ſuit properly founded on an account, according to the true meaning of the act, when the plaintiff cannot ſupport it without producing his account, which when produced appears to be a ſtore account? The latter ſeems to be the juſt conſtruction: And this conſtruction eſtabliſhes the diſtinction between an expreſs and implied promiſe. In the one caſe the account muſt be produced, and the law will operate upon it; in the other, the ſuit is maintainable, without the account. The ſubſequent parts of the law ſupport this expoſition. The penalty for poſtdating an article, and the clauſe for rejecting ſuch articles as ſhall have been delivered more than ſix months, ſuppoſe the account before the court.

It is objected that this conſtruction would defeat the law; as merchants would on all occaſions, bring in witneſſes to prove aſſumpſits. If the proof be *untrue*, every caſe, as well as this, muſt be ſubject to the inconvenience: If *true*, where is the miſchief? It is ſaid the act will be evaded. But the act relates only to ſuits upon the account; and not more to actions on a ſpecial contract, than to thoſe on a bond, where the germ is a ſtore account. The ſpecial verdict ſhews the caſe to have been one comprehended in the act of 1779; and the queſtion of law refered to the court is, Whether, after the action has been barred on the account, it may be maintained on a ſpecial promiſe? The caſe of a bankrupt is extremely appo-

ſite. He is as completely diſcharged by law as was the purchaſer in this caſe: But if, though ſo diſcharged, he yet thinks himſelf under a moral obligation to pay a debt, that moral obligation ſupports the promiſe. So in this caſe, a promiſe, in conſideration of the moral obligation, will ſupport the action, it not being neceſſary to bring the account before the court. We are therefore of opinion that it is to be certified that the law upon the verdict is for the plaintiff.

WATKINS's Executors,

against

TATE.

THIS was a writ of error to a judgment of the General Court, rendered on a bond given by three obligors. The ſuit was inſtituted againſt the ſurviving obligor, and againſt the executors of each deceaſed obligor, but was diſcontinued againſt the ſurviving obligor, and judgment was rendered againſt the executors of the two deceaſed obligors.

A joint obligation ſurvived before the act of '86.

The ex'ors of two deceaſed obligors cannot be joined in the ſame action.

The declaration ſtated the obligation to be joint; and therefore, becauſe at that time a joint obligation ſurvived, the executors of the deceaſed were admitted to be diſcharged; and the judgment was reverſed.

Judge Mercer obſerved, that the caſe of *Grymes & al.* vs *Robinsons adm'rs*, decided in the former Court of Appeals, was an expreſs authority to prove that, at law, the executors of two perſons could not be joined in the ſame action. In that caſe the Judges, then ſitting had unanimouſly given that opinion. But the Preſident, who was one of the adminiſtrators, and did not ſit in that cauſe, now ſaid he was never ſatisfied with the deciſion in it; and wiſhed the point to remain open to be reconſidered, ſhould it again occur.

JUDE, Executor,

againſt

SYME.

The declaration may be amended after a trial, and a juror withdrawn.

THIS was an appeal from a judgment rendered by the Diſtrict Court. The executors of John Jude, deceaſed, had inſtituted a ſuit in the General Court, on a ſpecial contract, in writing, between their teſtator and John Syme, for the delivery of the crop of wheat of a particular year. Upon the trial it appeared that the contract was ſatisfied; but that the crop of another year had been delivered, without any ſpecial agreement. The evidence was not excepted to by the counſel for the defendant, but was permitted to go to the jury; who could not agree, and a juror was, by conſent, withdrawn. A motion was made to amend the declaration; on which the court was divided, and the motion fell. The cauſe was then, among others, transfered by act of Aſſembly to the Diſtrict Court, where the motion to amend the declaration, by adding a new count, was renewed, and was granted. The count was added, and the defendant pled *de novo*. This amendment, after a jury had been ſworn in the cauſe, was aſſigned as error; but the court was unanimouſly of opinion that it was not error, and that the cauſe was in paper notwithſtanding the jury had been ſworn, as no verdict was rendered; during which time amendments, in favour of juſtice, were within the diſcretion of the court.

JOHNSTON,

againſt

SYME.

THE plaintiff, in the motion, had obtained a judgment againſt the defendant at common law; to which judgment the defendant had obtain-

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ed an injunction, on giving security for performing the decree of the Court of Chancery: On hearing the bill was dismissed; and from that decree the complainant Syme appealed to this court. The same person, who had been his security, on obtaining the injunction, was his security on the appeal; and now this motion was made for a rule to dismiss the appeal, unless the appellant would give further security; because the security in the appeal bond, having been security to the injunction, was already bound for the debt; and was, therefore, not such additional security, as every appellee was entitled to. But this motion was overruled, the objection being deemed insufficient; and this further rule was entered into, "That ob- "jections to securities given upon obtaining writs "of supersedeas, writs of error, or appeals, shall "hereafter be made to that court, to which the "writ, or record shall be returnable, and not af- "terwards."

JOHNSTONS,

against

MERIWETHER.

If a forthcoming bond be not good as a statutary bond, it may be good as a bond at common law.

On a bond with a collateral condition the jury may find more damages than are laid in the declaration.

WALTER KING COLE, had obtained, against Thomas Johnston one of the plaintiffs, who was sheriff of the county of Louisa, a judgment; and thereupon an execution issued; which was served by the defendant, as coroner, on the property of the plaintiff; who gave, for the forthcoming of the property on the day of sale, a bond to the coroner himself, instead of the plaintiff, with the following condition,

"The condition of the above obligation is such, that whereas the said Meriwether this day took into his possession sundry slaves viz. Sam, &c. by virtue of an execution issuing from the general court, amounting to £. 564: 0: 5, including costs;

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now if the ſaid ſlaves, together with as many more under as good a title as the above ſaid ſlaves, are delivered to the ſaid Meriwether, when required, on the ſame plantation for ſale, then the above obligation to be void, otherwiſe to remain in full force."

The condition of the bond being broken, Meriwether inſtituted a ſuit thereon; and having ſtated in his declaration the bond and the condition, aſſigned the breach thereof in the following words. "And the plaintiff in fact ſaith, that in conſequence of the ſaid writing obligatory, he delivered up the ſlaves therein mentioned, on which he had levied an execution by virtue of his office of coroner for the ſaid county, *but* that neither the ſaid ſlaves, nor as many more under as good a title as the ſaid ſlaves, were by the ſaid defendants, or either of them redelivered to the ſaid plaintiff when required, according to the condition of the ſaid writing obligatory; but although the ſaid defendants were by the ſaid plaintiff often required to deliver to him the ſaid ſlaves, or as many more as aforeſaid, they the ſaid defendants conſtantly refuſed to do ſo, and did not deliver the ſaid ſlaves or either of them, or any ſlave, or ſlaves, in lieu thereof, to be ſold as aforeſaid, to the ſaid plaintiff, as by the ſaid defendants undertaking in the condition of the ſaid writing obligatory they were bound to do; whereby &c.

The declaration lays the damage at ten pounds. Iſſue was joined on the plea of conditions performed; and verdict was given, and judgment rendered for the plaintiff Meriwether for the ſum of £. 750.

The motion for a writ of error in this caſe was made by Ronald and Duval, and oppoſed by J. Taylor and Marſhall.

RONALD and DUVAL in ſupport of the motion. The bond on which the judgment was rendered

is void; and, if it be not void, yet the proceedings are erroneous: so that upon either ground, the writ of error ought to be granted.

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The bond is made void by the act of 1748, *chap.* 6. *Sect.* 7. It is true that the first part of that section speaks only of persons in custody, but the expression of the latter part is general; and, positively, makes void every bond taken by a sheriff, by color of his office, in a form varying from that permitted by that act, or by some other. If the law was otherwise, officers would have it in their power to extort bonds from persons in custody or their friends, for little favors allowed them, which would greatly injure the public justice of the country. In *Durnford and East* 418, it was held that the court can presume nothing right contrary to the record, although after verdict; and, if it appears to the court that the verdict was rendered on an illegal consideration, the verdict must be void, and cannot authorise a judgment for the plaintiff, 2d, *Bur.* 924; which case also proves that the consideration, here was void.

Again the bond was void, because it was oppressive; Johnston was not only to deliver the slaves taken in execution, but as many more, of as good a title. The officer might from time to time object to the title of the slaves delivered, and thus look into the title of all those in Johnstons possession. This is countenanced by the mode of assigning the breaches. The declaration does not merely state that Johnston did not deliver as many more slaves, but that he did not deliver as many more of as good a title.

But it is oppressive in another point of view. The officer takes in execution eight negroes. These may be all in the debtors possession. He is entitled by law to the restoration of this property on giving bond with security to have it forthcoming on the day of sale; but this benefit, which the law gives, is withheld by the officer, unless he will bind himself to do more than the law requires,

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more perhaps than he can poſſibly do: that is, to produce property which not only is not in execution, but which perhaps may not be within his power. This ſurely is oppreſſive.

The bond is illegal for uncertainty; becauſe no time is expreſſed when the ſlaves ſhall be delivered, but they are to be produced when required. Suppoſe ſuch a bond taken by a ſheriff on the execution of a *capias ad respondendum*, that the perſon would appear not on a given day, but when required: Would it not be clearly void? And yet the reaſon is the ſame, becauſe, if a proper bond be not given, the ſheriff is as much bound to keep the goods taken in execution at his own riſk, as he is to keep the perſon.

The bond is uncertain too; becauſe it does not ſpecify for whom, or on whoſe property, the execution was levied. The debtor would conſequently not be protected, by this bond, from another execution for the ſame debt.

If the bond be not void, ſtill the judgment ought to be reverſed; becauſe the proceedings are erroneous.

The demand ought to be plainly ſtated in the declaration; but from it you cannot collect when, or where, the demand was made, nor is the demand poſitively avered.

The condition of the obligation is in the conjunctive, that he ſhall deliver the ſame ſlaves and as many more; but the breach aſſigned is in the diſjunctive, and therefore does not agree with the condition. If it be ſaid, that this is cured by the verdict, the anſwer is that a verdict cannot eſtabliſh what it was unneceſſary to prove; and it was only neceſſary to prove what was alledged in the declaration 1 *Durnford & East* 145.

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Different breaches are assigned by the plaintiff, as well the failure to produce, as many more, as the failure to produce the eight slaves actually taken in execution; so that it is uncertain for what the damages are assessed. If for not producing the slaves not in execution, it is clearly oppressive.

The verdict is erroneous also, because the damages laid in the declaration are only ten pounds, and a verdict is found for £750.

J. TAYLOR and MARSHALL *contra*. By the 12th sect. of the 8th chap. of the acts of Assembly, bonds for the forthcoming of property taken in execution, may be given to the sheriff, or other officer, serving the same: By the 2d sec. of the 3d chap. of the acts of 1769, bonds, payable to the creditor, may be taken by the officer, for the forthcoming of property taken in execution: And by a subsequent section, if the property be not produced, judgment may be rendered, and execution awarded, on motion, against the principal and his securities. This does not repeal the act of 1748, and the two laws may well consist together. Remedy, by motion, is given only on those bonds which are taken under the act of 1769: But such bonds may still be taken under the act of 1748; and the common law remedy must be resorted to, where the condition is broken. Bot acts are permissive, and not imperative. The 6th chapter of the acts of 1748 seems not to have been designed to extend further than to regulate the service of mesne process; for, in the same session, the service of executions is taken up, and provided for.

Neither the statute of *Henry 6th*, from which it was nearly copied, or the act of 1748, seems designed to have comprehended other cases than those where the person was in custody. The motives to the law were the prevention of oppression, and the restraint of the officer from bailing,

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improperly, any debtor in cuſtody, to the injury of the creditor. Theſe miſchiefs can only exiſt where the perſon is in cuſtody.

Such has been uniformly the expoſition of the Britiſh ſtatute 4 *Bac. ab.* 464, 10 *Co.* 99. If the act of Aſſembly does not annul the bond for its form, then it is obligatory, unleſs there be ſomething vicious in itſelf. It is alledged to contain two qualities, either of which is ſuppoſed to be ſufficient for its deſtruction. They are oppreſſion and uncertainty.

The condition is ſaid to be oppreſſive, becauſe, under it, the officer might inſpect the title to every ſlave, and becauſe it requires the delivery of other ſlaves than thoſe taken in execution, which certainly the debtor was not bound to deliver, and which, perhaps, he might not have the power of delivering.

If upon the face of the writing the obligation muſt neceſſarily be oppreſſive, and cannot be otherwiſe, then, perhaps, the debtor may avail himſelf of it, without pleading it, and putting it in iſſue; but, if it may, or may not, be oppreſſive, according extrinſic circumſtances, then the debtor, to eſtabliſh the fact and avail himſelf of it, muſt put it iſſue. In caſes thus uncertain upon the face of the inſtrument, if ſuch be his real defence, he may avail himſelf of it by pleading; if ſuch be not his real defence, and he has not choſen to put his cauſe upon it, the court will not preſume the exiſtence of the fact againſt the juſtice of the caſe, and againſt a verdict rendered on a fair trial.

In the preſent caſe oppreſſion does not flow neceſſarily from the bond, but depends on extrinſic circumſtances. It does not appear nor is it alledged, that any oppreſſive means have been uſed to induce its ſignature. This can not be preſumed, for the officer had no intereſt in uſing them. Any thing unuſual in its expreſſion may, ſince the offi-

cer is thereby put in hazard without a poſſible benefit, fairly be conſidered, at leaſt on his part, as the reſult of accident rather than deſign. The inconvenience, if it be one, reſulting from the right of the officer to inſpect Mr. Johnſtons title to his ſlaves is incured voluntarily by himſelf, and he had a right to incur it. Had it been oppreſſively inſiſted on by the officer, the fact might, and would have been pleaded; and, if not, the verdict, even on the iſſue actually joined, ought to have been found for the defendant in the court below. So with reſpect to the ſlaves contracted to be delivered, although not taken in execution. The probability, and certainly the poſſibility, is, that the debtor was in poſſeſſion of ſlaves ſufficient to ſatisfy the execution; that thoſe taken were not ſufficient for that purpoſe; and that the officer, perceiving that a bond for the forthcoming of the property would certainly be given, might ſuppoſe it immaterial, whether he proceeded to ſerve the execution on other property, or included it in the bond, without actually taking it in execution. This ſurely is not oppreſſion; and, if it ſhall only appear that the bond might have been taken without undue means or intentions, ſuch means ſhall not be preſumed when the party himſelf does not ſuggeſt or chuſe to rely on them. If a verdict be plainly founded on an illegal conſideration, it is admitted to be void; but it is denied that the preſent verdict ſtands on that foundation. If the bond be not void on the ground of oppreſſion; neither is it on that of uncertainty. There is no uncertainty pretended in the obligation; it is only alledged to exiſt in the condition. It is a new doctrine, that uncertainty in the condition of a bond ſhall deſtroy the obligatory part. But there is really no uncertainty in the condition. The time when the property is to be delivered is not fixed, but the delivery muſt be preceded by a requeſt; and then the time becomes certain.

It is alledged that it does not appear for whom, or on whoſe property, the execution was levied; and

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that therefore a new execution might iſſue on the original judgment; but this is known not to be the caſe; becauſe a new execution is forbidden by the return on the old one, without regard to the bond which has been taken.

All theſe objections go to ſhew, that the creditor is deprived of his remedy on this bond, by motion; but not that it is void, and that the officer who has become accountable to the creditor, muſt ſuſtain the entire loſs without recourſe.

The declaration does ſtate a demand, and it is not neceſſary to ſay where the demand was made, ſince the condition of the bond does not require it.

The breach is well aſſigned. Had the condition been in the disjunctive, and the breach been aſſigned in the conjunctive, then, indeed, the declaration might have been erroneous: but ſurely an averment, that neither condition was performed, amounts to a ſufficient averment, that both were not performed. A part may be done and not the whole; but the whole cannot be done, and every part remain undone.

Nor is the verdict erroneous, becauſe it exceeds the damages laid in the declaration. This has been uniformly adjudged to conform with the 6th. *ſec.* of the 5th *chap.* of the *Acts* of 1748.

The Court unanimouſly rejected the motion.

The Preſident did not ſit in the cauſe.

BARRET,

against

FLOYD.

What jurisdiction a court of equity may exercise after a trial at law.

THIS was an appeal from the High Court in Chancery. In the year 177 , a British merchantman stranded and sprung a leak near one of the little islands in the Chesapeake; and, with her cargo, was totally abandoned by her crew. Berry, Floyd, and others with him, came on board her, and began to save the cargo. Almost immediately after, Barrett, with another company, came up in a boat, and were asked to come on board, and work. They replied that they wished first to know on what terms, and were told that, if the vessel should be condemned as a prize to them Floyd and others, that they Barret and others should be allowed $\frac{11}{17}$ of what they should save: But, that if the vessel should not be condemned as a prize, they would of consequence be entitled to what they could save. Barrett and others, thereupon, came on board, and by their labor saved the greater part of the cargo. Floyd and others immediately libelled the vessel and cargo, in the court of admiralty, and filed a claim, for Barret and others, to $\frac{11}{17}$ parts of the proportion saved by them. By the sentence of the court of admiralty, the vessel with the cargo &c. were condemned, and $\frac{11}{17}$ of the part saved by Barret and others were decreed to them. Soon after the decree was rendered, Barret and others, who had designed to contest the condemnation of the vessel, arrived; but being advised that they were too late, they received the part to which they were entitled under the sentence of the court. On their return to the Eastern shore, where they both resided, Barret and others were induced to suppose that the sentence of the court of admiralty was illegal, and unfairly obtained; and that the subject might be received in a court of law. They instituted an action against Floyd and others, in the

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county court, to recover the difference between the money received by them, under the ſentence of the court of admiralty, and the amount of ſales of that part of the cargo which was ſaved by them. and declared for ſo much money had and received to their uſe. Iſſue was joined on the plea of *non-aſſumpſit*, and the firſt jury diſagreeing was diſcharged, and the cauſe continued. At a ſubſequent court, verdict and judgment was rendered for the plaintiffs. An execution iſſued, which was ſatisfied by a bond for the amount, payable at a future day. On this bond, a judgment was obtained; which was enjoined in the Court of Chancery, and on a final hearing the injunction was rendered perpetual; from which decree, Barret and others appealed to this court.

Marshall for the appellants, admitted that whatever ſentence the Court of Admiralty ought to have rendered, ſtill that which they did render not having been appealed from, was binding on the parties, and the verdict in the county court ought to have conformed to it; but admitting this, he inſiſted on the binding force of that verdict, and on the total incapacity of a Court of Chancery to control it. A verdict ought always to conſiſt with the very right of the caſe, but it often happens that a Court of Chancery would have determined the cauſe otherwiſe than a jury has determined it; yet when this does happen, the Court of Chancery cannot, unleſs there be ſome unfair ingredient to give them juriſdiction, faſhion the verdict according to its opinion of the right of the caſe.

It is not eaſy to conceive a caſe, which affords leſs cauſe, for the interpoſition of a court of equity, than the preſent. The trial has been a full, and a fair one; from the complexion of the whole caſe, it is obvious, that the defendant, in the court of law, was not, and could not be ſurpriſed. He knew the claim of the plaintiff; he came prepared to conteſt it. It is not pretended that any unfair

practiſe was uſed; nor is it even alledged, by the party himſelf in his bill, that he was not fully prepared, or that the whole caſe was not before the court and jury. The action was an equitable action. The plaintiff could only recover on the equity of his caſe. The defendant could not poſſibly reſort to a ſingle principle for defence in a court of equity, which was not of equal avail in a court of law. The cauſe comes on to be tried in Chancery preciſely on the ſame facts, which have already been decided on in a court of law, and a jury. Nothing is, or can be alledged, but that the court of law decided againſt the law of the caſe. If this be ſufficient ground for equitable interpoſition, then does the Court of Chancery erect itſelf into an appellate court from general verdicts and judgments thereon, both as to law and fact. The deciſion of a county court, unappealed from, as entirely binds the ſubject, as the deciſion of the Court of Appeals. As well therefore may a Court of Chancery correct legal errors in this court, as legal errors in another court, whoſe judgment the parties have made final, by taking no exception, and praying no appeal. If that court may interpoſe in this caſe, there is no point of law which may not be carried into it. Suppoſe an action of detinue, where the only queſtion was the legal title to the thing ſued for, ſhould be determined in a court of law againſt the law of the caſe, would it be a ſufficient cauſe, for going into Chancery, to ſay, that although the whole caſe came fully before the court and jury, yet they miſunderſtood the law, and the counſel for the defendant permitted the point of law to be buried under a general verdict? If that would not be a proper caſe for a Court of Chancery, ſtill leſs is the preſent. In that caſe the legal title would, generally ſpeaking, give its poſſeſſor ſome equity; in this caſe the legal title gives him none. If there be any original equity in either of the parties, it is only produced by the labor expended in ſaving the cargo. Each party then had an equitable title to

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the portion saved by itself. Barret and others have now only what they saved: Each party then is now possessed of that, and of that only, to which with respect to each other, each party was originally equitably entitled. The sentence of the court of Admiralty is admitted gave to Floyd and others a legal right to that which was adjudged to them; but it gave them only a legal right; it did not enlarge their equity. They had then a legal title, but of that legal title, which the admiralty sentence gave them, the judgment of the county court has deprived them. The law which was once in their favour, is now against them, and they have not even the pretext for coming into this court, which the person would have in common cases, who had lost a good title by a general verdict; because they never had, in their favour, any thing, but positive law.

If the jurisdiction of a Court of Chancery be so extensive, as it must be, to comprehend this case, then surely, some authority for it may be produced, either from some treatise on the general principles of that court, or in some adjudged cases. If there be such let them be adduced. It is believed, however, that none exist: On the contrary, those which have been consulted assign much more limited powers to a court of equity, than must be assumed in order to support this decree, 3 *Black. Com.*. 430. 1 *Eq. ca. ab.* 130, 2 *Eq. ca. ab.* 243, 524, 162.

But the case of *Langdon against the African company and Dock, Prec. ch.* 221, is the very case: In that case, as in this, the vessel was condemned by the sentence of a court of admiralty: In that case, as in this, a court of law rendered a judgment in direct opposition to the sentence of the court of admiralty: In that case, as in this, application was made to the Court of Chancery to be relieved against the judgment; but, in that case, the relief was refused.

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Upon authority then, as well as upon principle, the decree of the Chancellor ought to be reverſed.

NELSON for the appellees. The confuſion would be great indeed, and litigation endleſs, if, after a ſupreme court has decided upon a ſubject, an inferior court may take cognizance thereof, and rejudge it. This cauſe was fairly tried in the court of admiralty, which was the proper court to decide upon it. The deciſion of that court muſt be admitted to be right, and conſequently the judgment of the county court, being contrary thereto, muſt be againſt the principles of juſtice. It appears, from the note in 1 *Eq. ca. ab.* 130, that relief may be granted after a trial at law. For a verdict, ſuch as this, attaint would lie; but ſtill that is a harſh puniſhment, and not an adequate remedy to the injured perſon. In 1 *Eq. ca. ab.* 237, *pl.* 11, 12, equity relieved againſt a judgment at law rendered againſt an executor on the plea of *ne unques executor.* This was affording relief againſt a judgment rendered according to the ſoundeſt principles of law.

A court of equity will not ſuffer a perſon to be injured when he has no other relief. The court of law has committed an error, which will admit of correction no where elſe: It muſt then be the province of this court to correct it, or the party is without redreſs. *Harr. ch. prac.* 11, 9.—3 *Black. com.* 54. The caſe reſembles thoſe of uſury and gaming; in which it has been often held, that equity will relieve againſt judgments rendered by a court of law.

MARSHALL in reply. It has never been contended that inferior tribunals may draw before themſelves ſubjects which have been determined in ſuperior courts. It is admitted that had the counſel for the defendant ſpread the caſe upon the record, the judgment of the county court might

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have been reverſed at law. The queſtion is not, whether the county court erred, but whether the error be of ſuch a ſort as to give juriſdiction to a Court of Chancery? The judgment was againſt law, but not neceſſarily againſt the juſtice of the caſe; becauſe it was contrary to the ſentence of the court of admiralty. However, admitting it to be unjuſt, does by no means admit the cognizance of a court of equity. Juries, under the direction of a court of law, judge upon the juſtice, as well as law of a caſe; and it would erect a Court of Chancery into ſtill more than a Court of Appeals, if their verdicts might be ſet aſide for injuſtice.

This caſe does not reſemble the caſe of relief granted to an executor. It is the admitted province of a Court of Chancery to relieve againſt the rigor of the law, as in caſe of penalties; and, in the caſe cited, a heavy penalty was incured by accident. It is true that equity will relieve againſt judgments on uſurious and gaming contracts. But if in either caſe, the whole fact had been fairly tried in a court of law and judgment rendered, no caſe can be ſhewn, where ſuch a judgment was enjoined upon the ſame teſtimony, and merely becauſe a court of law had decided againſt law.

BY THE COURT.

It is not neceſſary to go over the extenſive ground of conflict between the courts of common law and Chancery. The juriſdiction of the Court of Chancery has regularly increaſed, and is found to be beneficial to ſociety: It ſhould rather be enlarged, than circumſcribed. Numerous caſes ſhew, that Courts of Chancery have interfered after trials at law. The caſe of a receipt evidencing the payment of money, for which, notwithſtanding, a judgment has been rendered: And that of a judgment againſt an executor on the plea of *ne unques executor*, may be put as examples. The latter was a caſe of extreme ſeverity,

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and merited relief. It would be cruel that a man, for ſo ſmall a miſtake, ſhould be liable for ſo large a ſum: It would be contrary to moral juſtice. But if the rule that equity was not to interfere after judgments at law, was never to be departed from, it muſt have ſtopped at the threſhold.

In this caſe the complainant ſays, that the decree of the court of admiralty was a bar to the action at law: The defendant ſays he ſhould have availed himſelf of it at law.

A receipt is a defence at law, yet it has ever been admitted to be uſed in equity after a judgment at law.

A proper diſtinction is, where the defence comes to the knowledge of the party after the judgment.

In the caſe cited from *Prec. ch.* the action brought was in trover; and the declaration gave notice of the cauſe of action. Therefore it was then incumbent on the defendant to ſet up the proper defence.

This is an action for money had and received to the plaintiffs uſe. Although it be a liberal and beneficial action, yet it muſt be allowed that the declaration gives no notice to the defendant of the nature of the claim. The foundation of the deciſion in both courts was the ſame.

Whether the veſſel was a prize or wreck was properly triable in the court of admiralty. Both parties ſo underſtood it, and applied to that court. They are at iſſue, and it is decided to be a prize. The receipt of their proportion of the money is a ſtronger acquieſcence under the decree of the court of admiralty, than the bond is under the judgment of the county court.

The decree was affirmed by the unanimous opinion of the court.

Judge Fleming was abſent.

LOMAX,
againſt
PENDLETON.

At what time the act of limitations begins to run.

A truſtee retaining money in his hand for an unreaſonable length of time, ſhall pay intereſt.

THIS caſe was adjourned from the High Court of Chancery. The ſuit was inſtituted in the county court of Caroline, by Mr. Pendleton; and the bill ſtated, that Thomas Wyld, in order to diſcharge a debt due to Lidderdale & co. drew on the firſt of May 1753, a ſet of bills on Meſſrs. Chauncey, Barclay & co. merchants of London, to whom he had before conſigned a quantity Ginſeng. The complainant and Lunsford Lomax, at the requeſt of the ſaid Wyld, agreed to become indorſers of the ſaid bills; and therefore the bills were drawn in their favor.

The complainant indorſed, for Wyld, other bills to a conſiderable amount. In June 1753, he received information that the bills would be proteſted; and, thereupon, he obtained a conveyance of the whole eſtate of the ſaid Wyld to himſelf, in truſt for the payment of his debts. The bills were returned proteſted, and payment of them demanded from the complainant; who, in the year 1753, ſold the whole eſtate on ſix months credit, and ſet induſtriouſly about the collection of the debts. He diſcharged the debts due from Wyld, in the order of priority mentioned in the deed, as the money came to his hands, and as he could ſpare it from his own eſtate. The whole debts were paid by the month of October 1762. It then appeared that his payments had exceeded his receipts £. 402: 16: 9; which added to the expenſes of ſales and collection, left him in advance, for Thomas Wyld, the ſum of £. 531: 1: 7; which muſt fall on the bills indorſed by the complainant and Lunsford Lomax, as that was the laſt mentioned debt in the ſaid deed. *In ſupport of this ſtate-*

ment, an account ready to be produced was refered to by the bill; which account, when produced, shewed the trust estate not to have been closed until 1765.

The bill further states, that, being much perplexed with business, the complainant did not apply to Lomax, until some time in the year 1766; when he transmitted to him an account claiming a moiety of the money paid by him on the bill endorsed by them both, with interest from October 1762. Payment was refused; and this suit was instituted in 1762.

The defendant pleaded the act of limitations; and in his answer, stated that he did not recollect, or admit having indorsed the bill; that he had no notice of its protest, or of its payment, until 1766; and that he knew not whether the complainant had, or had not, expended the trust estate; or whether he had paid any part of the bill.

The accounts were refered to commissioners; and the suit, which abated by the death of Lunsford Lomax, was revived against his administrator Thomas Lomax. It appeared, on the report, that Lunsford Lomax had, with the complainant, indorsed the bills; that the trust estate was exhausted; that the complainant had advanced the money stated in his bill; that the last receipts of the money had been in October 1764; and that the last payment was in 1765.

It likewise appeared on the report, that money had sometimes remained in the hands of the trustee, which was not immediately applied in payment of the debts; but the commissioners had not charged the trustee with interest thereon, although the debts carried interest. A larger sum was reported to be due, than the plaintiff had claimed.

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It further appeared that the bill of exchange was taken up by the complainant, and his own bond executed for the amount thereof, in November 1756.

In 1786, the county court of Caroline overruled the plea, and decreed the defendant to pay to the plaintiff a moiety of the money, ſtated in the report to have been paid by the plaintiff for Wyld, on the ſaid bill; from this decree, the defendant appealed to the High Court of Chancery; by which court the cauſe was adjourned to the Court of Appeals, where it was argued before Judge Lyons, Judge Carrington and Judge Fleming, by Nelſon for the appellant and Taylor for the appellee.

NELSON contended that the decree of the county court was erroneous, 1. Becauſe the complainant had no right to come into Chancery for contribution. 2. Becauſe the ſuit was barred by the act of limitations; and 3. Becauſe the account was erroneous.

I. The complainant had no right to come into Chancery for contribution, becauſe they were not joint ſecurities. The bill was not jointly endorſed by them, but ſeparately, with the name of Lomax above that of Pendleton. Conſequently, Pendleton might have maintained an action at law againſt a prior indorſer; and, having a complete legal remedy, his application, to a court of equity, is not proper.

II. The ſuit is barred by the act of limitations.

The right of action accrued in November 1756, when the appellee took up the bill of exchange, and executed his own bond for its amount. Without a queſtion, the bond diſcharged the bill; and conſequently gave to Pendleton the ſame right, to inſtitute this ſuit thereon, which he now poſſeſſes. If the right of action then accrued, the act of limi-

tations then commenced its operation; and as it will unqueſtionably run againſt a bill of exchange, the plaintiffs action, on this bill, was barred, before the ſuit was inſtituted.

To this operation of the act of limitations, there can be no objection, but the deed of truſt. But the anſwer to this objection is, that the appellant was not a party to the deed; nor was he even named in it. The deed therefore, although it might furniſh an equity againſt the plaintiff, could not arreſt the act of limitations.

III. The account is improper.

The arrangment for the payment of the debts is, under the circumſtances of this caſe, inadmiſſible. Pendleton, without conſulting Lomax, takes to himſelf a deed of truſt for the whole property of Wyld. In this deed thoſe bills, which he had indorſed ſingly, are named, and the payment of that which was indorſed by Lomax, is poſtponed, that the loſs, ſhould any exiſt, might fall on Lomax.

The account is erroneous, too, in giving to the plaintiff more than he demands in his bill.

It is further erroneous, in not charging him with intereſt on money in his hands. A truſtee is accountable for intereſt, 2. *Eq ca. ab.* 96. When he had money in his hands he ought to have ſtoped intereſt, and by not doing ſo he has made himſelf liable for it.

J. Taylor for the appellee. On the arrangement of the debts in the deed of truſt there can exiſt no ſubſtantial cauſe of complaint; becauſe Wyld had the power, and did himſelf make the arrangement.

The original foundation of the demand is unqueſtionably that of a joint ſecurity, who has him-

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ſelf paid the debt. That the bill was made payable to both is proof that the indorſement was joint; and, as the amount of the debt was fixed by auditors in preſence of the parties who made no exception thereto, it is now too late to except; and mutual conceſſions may fairly be preſumed to have been made, ſo as to eſtabliſh a balance ſatisfactory to both.

But the great queſtion in the caſe is the act of limitations.

This act bars the remedy, and not the right. It enacts that all actions of treſpaſs &c. ſhall be brought within the time preſcribed by the law, and not afterwards. Suits in Chancery are not enumerated; and therefore are not literally within the act. Courts of Chancery however have adopted it by analogy, where a party may ſue in either court; but where the ſuit can only be brought in equity, as in caſes of legacies, truſt and fraud, the act does not run.

Here there was no remedy until the truſt eſtate was ſettled. Till then he could not have maintained his ſuit in this court. With the property of Wyld in his hands unexhauſted, this court would not have decreed him the property of Lomax likewiſe.

Equity will alſo regard great length of time, for it might produce loſs of teſtimony, and affords a preſumption of payment; but here there can be no ſuch preſumption; and the delay was favorable to Lomax, of whom leſs is now demanded than half the bill.

The act then cannot be conſidered as commencing till the truſt was cloſed, which was in 1765; and in 1768 the ſuit was inſtituted.

But it may be objected, that the bill ſtates the truſt eſtate to have been cloſed in 1762.

This was evidently the mere error of counſel in ſtating the caſe, *currente calamo*. A judgment

Loman, &c Pendleton.

was obtained afterwards; which proves inconteſtably the miſtake. Even in indictments, a chronological error is not fatal. A bill ought not to be concluſive evidence againſt a plaintiff: Since the allegations cannot aid him, it would be ſtrange if they ſhould injure him, when proved to be founded in miſtake. At law, indeed, there may be a nonſuit, if the declaration is not ſupported; but this was never heard of in Chancery. Chancery is not governed by miſtakes, but relieves againſt them. The replication too avers that the truſt was not cloſed till within five years before the ſuit was inſtituted, and this cures the miſtaken ſtatement of the bill.

To the argument concerning the bond, he anſwered that it was a queſtion not yet decided, and of great difficulty, whether the act of limitations would, under our acts of Aſſembly, run againſt a bill of exchange.

But admitting that it does run, and admitting that the bond did diſcharge the bill, yet the bond was given during the exiſtence of the truſt; till the ſettlement of which the plaintiff could not ſue.

He might have given the bond as truſtee, and the court will not now preſume otherwiſe.

To the exceptions to the amount of the decree, he anſwered that, as the account ſhewed more to be due than the plaintiff ſtated in his bill, the prayer for general relief, which was contained in the bill, would authoriſe a decree, for the whole ſum appearing to be really due. If more had been aſked, the ſmaller ſum, actually due, would have been decreed; and therefore, when leſs was aſked, the greater ſum actually due ought to be given.

The doctrine, that truſtees are liable for intereſt, is only true in caſes of miſapplication. This is never to be preſumed, and here is no proof of it. The contrary is preſumable, and the preſumption is ſupported by the report of the auditors. The ſuppoſitions againſt the report are not fair, now that they cannot

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be anſwered by ſhewing them to be illy founded, which might have been done at the time, if an exception had then been entered.

Here the cauſe is expected to come on, upon its principles, not upon exceptions to an account: which exceptions were not brought forward, or relied on, when the account was made up.

LYONS Judge, delivered the opinion of the Court.

After ſtating the caſe, he ſaid, that the ſuggeſtion concerning the preference given in the deed of truſt to thoſe debts for which Mr. Pendleton was alone accountable, was not well founded, and ought not to avail the appellant.

The important point in the caſe is, the time when the right of action accrued? It is contended, by the appellant, that the right accrued, and the act of limitations began to run, when the bill was taken in, and the bond executed for its amount. The court conſider all the circumſtances of the caſe. The complainant ought not to be barred, unleſs the execution of the bond was a payment, and gave him a complete right of action for the amount of the bills; for equity avoids circuity. It is then to be enquired, whether Mr. Pendleton could, under the circumſtances of the caſe, on the execution of the bond, have recovered from Mr. Lomax a moiety of the bill? If he had inſtituted a ſuit at law, Mr. Lomax would have gone into Chancery, and have claimed the benefit of the truſt. The court muſt have enjoined the judgment at law, until the truſt was ſettled, or have divided the outſtanding debts, which would have been of no ſervice to Mr. Lomax: Therefore unleſs the bond be a payment, Mr. Pendleton could not have come into equity, until the truſt was finiſhed. What is the nature of the bond? It ſtopped the intereſt of ten per cent; and is given to ſerve the truſt ſtate, and to relieve Mr. Lomax, as well as Mr. Pen-

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ton. The bond was to be discharged out of the trust estate, and therefore ought not, in equity, to be considered as such a payment, as to create a bar to a suit in equity, for a moiety of the money, which, in fact, was afterwards paid,

The act of limitations then ought not to commence until the trust was concluded. The bill states this to have been in 1762; but the report shews that it was not till 1764; and from that time, the act of limitations runs. This suit, therefore, having been brought in 1768, is not barred by the act of limitations.

It is objected, that no interest is allowed on money collected from the bonds due the trust estate, while the money remained in the hands of the trustee: The court think this a good objection, and that an account ought to be taken, to shew when the trustee received money; and whether he retained it in his hands an unreasonable length of time. Small sums should not be considered as being certainly to be accounted for, and disposed of immediately; but large sums ought.

The certificate was as follows.

"The Court is of opinion, that the act of limitations is no bar to the demand of the appellee, under the circumstances of his case; but that he should account for interest on so much of the money received by him, under the deed of trust in the bill mentioned, as was not paid, in a reasonable time after collection, to the persons entitled to it by the said deed, if on an account to be taken, or rendered, it shall so appear, except on small, or inconsiderable, sums; that a reasonable allowance should be made, to the appellee, for his own trouble and expenses; and that the decree of the county court of Caroline ought to be reversed, and auditors appointed to re-state, and settle, the accounts, according to the foregoing opinion."

BRODDUS,
againſt
M'CALL & ELLIOT,

If A agree to furniſh B with goods at 25 per cent; on the prime coſt payable in caſh or tobacco at the market price; and B is informed of the prices, and takes ſome & rejects others; and ſeveral ſettlements are made, and a bond taken for the balance; yet if B afterwards diſcovers, that A. laid an advance upon the goods before they were ſhipt, & that the tobac. credited at 10 or 15 per cent leſs than the ſterling prices, a court of equity will grant relief.

SOMETIME in the year 1761, John & Robert Broddus, two planters in the county of Caroline, having determined to engage in trade, and to retail goods in partnerſhip, and having no correſpondent or acquaintance in Europe, applied to Archibald M'Call the principal factor of a conderable Scotch houſe, carrying on trade and merchandize under the firm of John and William M'Call, and made a verbal agreement with him, the purport of which Broaddus ſtates to be, that they might take up what goods they wanted, to be diſcharged at eighty five per cent on the firſt coſt, or ſterling prices, either in caſh or tobacco at the general market price, he the ſaid Archibald M'Call aſſuring them that they ſhould not be impoſed on, but be dealt with fairly and honeſtly.—Notice of this agreement was given to William Snodgraſs, who kept a ſtore for the M'Calls at Todd's, and he promiſed to conform to it. Archibald M'Call ſoon after quitted the buſineſs, and was ſucceeded by William Snodgraſs; and the ſtore at Todd's was conducted by Robinſon Dangerfield. Goods to a conſiderable amount were taken up by the brothers, until ſome time in the year 1762, when William Broddus quitted the buſineſs, but John Broddus continued to carry it on, as uſual, for nine years. During this time, the balances were frequently aſcertained, bonds given, and very large payments made in money and tobacco. In the year 1770 the M'Calls declined their trade, and Robinſon Dangerfield called on John Broddus for his bond, which was executed for £ 1037 10, the balance alledged by Dangerfield to be due. M'Call & Elliott, to whom the bond was given, inſtituted a ſuit, and obtained a judgment thereon in the county court of Caroline; which judgment was enjoined by the ſaid Broddus in the ſame court, who, in his bill, alleged, in addition to the circum-

ſtances above ſtated, that he was unacquainted with the prime coſt of goods; that he had placed great confidence in the honor and integrity of the merchants with whom he traded; that in the various ſettlements which had been made, he had never inſpected the particular prices of articles, or enquired of other merchants concerning the prime coſts of ſuch articles as he had received; that he always believed the ſterling price, marked on the goods he purchaſed, was the real original price, according to a genuine invoice; that, in truth, (as he had ſince the execution of the bond diſcovered) the goods were ſold to him at a price compounded of the prime coſt, and 25 per cent thereon, on which compound price, the ſame per cent was laid, as he had ſtipulated to pay on the prime coſt; and that the tobacco he had ſold was credited to him below its market price. He prayed that an account might be taken of all the tranſactions between them; that the ſettlement ſhould conform to the agreement; and that the money unjuſtly received ſhould be refunded.

Several partners of the houſe of M'Call & Elliot, reſiding in Scotland, filed their anſwer, denying any knowledge of the agreement, and admitting that they had in their ſeveral invoices advanced the prime coſt of their goods variouſly as they would bear it, and declaring their inability at that time to ſay what particular advance had been laid on the goods purchaſed by Broddus.

Archibald M'Call filed his anſwer denying the agreement ſtated by Broddus; and averring that he had never pretended to ſell by an invoice ſtating the prime coſt of the goods, but on the contrary that he told him that there was a ſmall advance on all the goods; that the price would be told him when he ſhould purchaſe; and that he might take them or let them alone.

Robert M'Candliſh, who had ſold a large proportion of the goods to Broddus, ſtated in his anſwer that he always ſuppoſed the invoice by which

Broddus, v. M'Call.

he ſold to contain an advance on the prime coſt, nor did he ever pretend the contrary. That it was cuſtomary for Broddus to examine the invoice; to take ſuch goods as pleaſed him; and to reject ſuch as he diſliked, or thought too high charged.

William Snodgraſs, in his anſwer, averred, that he repeatedly informed Broddus, that he did not pretend to deal by original coſt invoices; and that thoſe, by which he dealt, were advanced. He alſo ſtated, that Broddus examined the price of all the goods he purchaſed; and was determined, in taking or rejecting them, by his approbation, or diſapprobation of the price.

It was proved that Broddus had made with M'Call ſuch an agreement as is ſtated by him, and that the invoice by which the goods were ſold to him was advanced variouſly, from about ten to 25 per cent, on the prime coſt. It was further proved, that in very many inſtances, the credit, given Broddus for tobacco delivered, was about ten or fifteen per cent, below the ſelling price.

In May 1787, the county Court of Caroline appointed "Auditors to ſettle the account between the parties, of the dealings in the bill mentioned, from the commencement thereof in the year 1761 to their concluſion, allowing the complainant 25 per centum ſterling on the amount of the purchaſes of the goods from the defendants, turning the ſaid ſterling money into current money at 85 per cent advance, and intereſt from the day twelve months therein after making ſuch purchaſes to the time of making up the ſaid account, he having charged intereſt from the ſaid period.

"That the ſaid auditors, in making up the ſaid account, do alſo allow the complainant the general current prices for the tobacco, of the inſpections whereat the tobacco was inſpected, at the ſeveral periods of his making payment of that ar-

ticle; that the said defendants do produce to the said auditors the amounts of the price of the goods delivered, and at what date, together with the amounts and date of each payment; and that the said auditors report the same to the court, stating such matters specially as either party might require, in order for a final decree."

In August 1787, a report was returned conforming to the principles of the interlocutory decree; by which the defendants were shewn to have received £ 245 : 2 : 8, more than they ought to have received.

The counsel for the defendants now offered in evidence written articles to shew, that the dealings comprehended in the report were for a time with John and William M'Call; for a time with John M'Call and co. and for a time with M'Call and Elliot: And it was contended, that the bond given to M'Call and Elliot should not be subject to a deduction on account of dealings with John & William M'Call, and with John M'Call and co. The complainant objected to the admission of these papers, alledging that they were offered too late; but they were admitted and read. It however appeared that there was no other material alteration in the company but its name, as the partners were nearly the same, and M'Call and Elliot, in their answers, had not alleged themselves to be exempt from account, for transactions in the name of the other firms. In August 1787, a final decree was made, perpetuating the injunction, and ordering the defendants to pay the complainant the said sum of £ 245 : 2 : 8, with interest; from which decree the defendants appealed to the High Court of Chancery

In March 1789, the cause came on to be heard in the High Court of Chancery, where the decree of the county court was reversed, and the High Court of Chancery decreed, "That the injunction

Broddus, vs. M'Call.

obtained by the appellee be diſſolved, except as to payments made, after the execution of the bond, an account of which payments were ordered to be made up before the commiſſioner, who was directed to examine, ſtate, and ſettle the ſame, allowing for the payments in tobacco ſo much money as the ſame were valued at by the referees; and to report the ſame to the court, ſtating ſuch matters ſpecially, as either party might require, or as he might think fit."

From this decree, the appellee prayed an appeal to the Court of Appeals where the cauſe was argued by Mr. Taylor for the appellant, and Mr. Baker for the appellee.

BY THE COURT.

In the year 1760, John and Robert Broddus entered into partnerſhip. To ſet this trade on foot, they having no correſpondents in Britain, apply to the defendants reſiding in this country, who were factors for Britiſh merchants.

The intereſts of the firms originating with John M'Call & co. centered in M'Call and Elliot.

John Broddus had a releaſe, and was no more intereſted.

The terms of the original contract were 85 per cent on the prime coſt of goods, with liberty to vary as the exchange varied, and payable in caſh, or tobacco, at the market price.

Their dealings continued for nine years, during which Mr. Broddus was regularly informed of the price of the goods he purchaſed, and took what he liked, and rejected the reſt. Several ſettlements, too, were made, and finally this bond was executed.

Broddus, vs. M'Call.

At ſome time during their dealings, Broddus diſcloſes his ſuſpicions, that the goods and tobacco were not fairly priced; and propoſes an arbitration, which was rejected. The ſuit was commenced in Auguſt 1772; In June judgment was confeſſed, and an injunction granted.

The complainants ſtate, that the average of advance on the goods was 25 per cent. The agreement is clearly proved; and any advance, on the prime coſt of the goods to the Britiſh merchant in his warehouſe before exportation, is a breach of that agreement. That there was ſuch an advance is plainly proved. The appellee then is clearly entitled to relief, if not barred by his acquieſcence, under the impoſition.

The firſt objection to granting him relief is, that he ſaw the goods, and was informed of the price, and might judge for himſelf.

But neither an invoice, or note of particulars, diſcovered to him, that the invoice, by which he purchaſed, was advanced. Even the agents in the ſtore knew nothing of the amount of advance. Under the influence of this ignorance he ſettles, and gives repeated bonds for the balance appearing on each ſettlement to be due. Ought thoſe bonds, now that the impoſition is diſcovered, to bar his relief againſt it?

It is a general principle, that bonds and other engagements derive their obligation from the conſent of the mind of the contracting party. A ſuggeſtion of falſhood, or a ſuppreſſion of truth, in ſuch a vice in their compoſition, as to deſtroy their original obligation. Would he have given theſe bonds, had he known the fraud which had been practiſed on him? His conduct, ſubſequent to the diſcovery of that fraud, ſhews he would not. In the caſe of *Bozanquet* vs *Dashwood*, *Cas. Temp. Talb.* 38, Lord Talbot aſks, "Muſt a man keep

Broddus, vs. M'Call.

money that he has no right to, merely becauſe he got it into his hands?" So it may be aſked, here, muſt he recover money, merely becauſe he has a bond?

The caſes of *Cole* vs *Gibbons* and *Chesterfield & al. ex'rs. of Spencer* vs *Janssen*, have been relied on.

In that of *Cole* vs *Gibbons*, any objection, which might lie to the original deed, was totally done away by the ſecond, when the fact was fully diſcloſed to him; and with a perfect knowledge of it, he executed the deed.

In that of *Chesterfield & al, ex'ers* vs *Janssen* there was no fraud or impoſition in the original contract. It was a fair contingent contract, without deception; and the riſk was perfectly equal. But be this as it may, the original objection (the diſtreſs of Mr. Spencer) was removed, when he confirmed it. The principle of theſe caſes is clearly right; but it does not apply to this caſe. Broddus was deceived throughout the whole tranſaction; and if he had given fifty bonds under the ſame deception, his title to relief would have remained undiminiſhed. The court is of opinion that he is entitled to relief.

The county court has charged 25 per cent, under the idea that that was the juſt average of advance on the goods. It is alleged, in the bill, that the goods were advanced ſo as to average 25 per cent; and the anſwer admits an advance, but does not ſay what that advance was. This is urged by the counſel, with ſome weight, as a confeſſion of the advance charged in the bill; but the court being about to relieve a man againſt his bond, will not be rigid. The depoſition of Mr. Pollard ſtates, that the goods were, in his opinion, advanced from 15 to 20 per cent. The court incline to take the meſne advance of $17\frac{1}{2}$ per cent, as the juſt average; and the decree to be as follows:

Broddus, *vs.* M'Call,

The court is of opinion "that there is error, in the decree of the High Court of Chancery in this, that the injunction was diſſolved as to all but the payments ſtated, and an account directed to be taken, in which no deduction was to be made for the average advance in the price charged as the firſt coſt of the goods; this court being of opinion, that in taking ſuch account, a deduction ought to be made for ſuch average advance at $17\frac{1}{2}$ per cent, inſtead of 25 per cent, in the mode purſued by the Auditors; whoſe account ought to ſtand in all other particulars, except a change of the deduction from 25 per cent to $17\frac{1}{2}$ per cent as aforeſaid, and of the conſequent calculations of advance and intereſt thereupon."

¶ *Note.* It appeared to the court from the inſpection of the account and other teſtimony in the cauſe that the average advance on the prime coſt of the goods was $17\frac{1}{2}$ and not 25 per cent.

HUGHES.

against

CLAYTON, and Theodosia his wife.

If an adm'r brings detinue, he is not bound, at the trial to produce the certificate for his obtaining letters of administration, unless he receives notice that it will be required.

Evidence of a communication between the father and his daughter's decd. husband as to the consideration on which a parol gift for slaves was founded, may be left to the jury.

THIS was an appeal from a judgment of the District Court of Petersburg, by which the appellees recovered from the appellant, in an action of detinue, ten negro slaves.

The declaration stated the said Theodosia while sole to have been possessed, of the slaves sued for, as administratrix of her late husband; and proceeded in the usual form. Issue was joined on the plea of *non detinet*.

At the trial, the defendant by his counsel moved for a non suit, because the plaintiff Theodosia's title accrued, if at all, as administratrix of Anderson Hughes deceased, and the plaintiffs had not produced any evidence, or proof, that administration, on the estate of the said Anderson Hughes, had been committed to the plaintiffs, or either of them; which fact, as alledged by the defendants counsel, was admitted by the court, but the objection was overruled; the plaintiffs having declared upon the possession of the administratrix while sole, and such possession being proved at the trial; and it not being the practice of the courts of this Commonwealth to produce the certificate for obtaining letters of administration in court, unless the party hath received previous notice that the same would be required.

The defendant also moved for a non suit, because there was no evidence of a deed from the decedents father the now defendant, to the deceased, and that such gift without deed, under the adjudication in the court of appeals, was void. But, the plaintiffs having offered testimony to prove a communication, respecting the intermarriage of the said Anderson Hughes deceased, and the plain-

Hughes, *vs.* Clayton.

riff Theodosia, as the consideration on which the said gift was founded, which testimony the court thought proper to leave to the consideration of the jury, the motion for a non suit was overruled; and the court left to the consideration of the jury, as well the testimony respecting such communication, as the evidence, produced on the part of the defendant, that the said verbal gift and delivery of the slaves in pursuance thereof were conditional, and made by the defendant to the deceased Anderson Hughes, near three years before any such communication respecting the said marriage which afterwards took effect between the said parties; whereupon the defendant by his counsel excepted to the opinion of the court in the premises, and prayed that his exceptions might be saved &c. which was accordingly done."

Verdict and judgment were rendered for the plaintiffs; & the defendant appealed to this court. The cause came on to be argued before all the judges, and the judgment of the District Court was affirmed.

BATES,

against

GORDON.

In detinue, If the jury find for the plaintiff, the slaves, if to be had, or £250 for each slave and damages 1 d; and the court render judgment for the slaves, if to be had, and if not the price found by the jury,

DAVID BATES, son and heir of John Bates, brought an action of detinue for sundry slaves in the possession of Andrew Gordon, administrator of Alexander Gordon deceased. The declaration claims the slaves, without laying a price or value. The cause was tried on the plea of *non detinet* and issue thereon; and the jury found the following verdict. "We of the jury do find for "the plaintiff the slaves mentioned in this declaration if to be had, or the sum of two hundred "and fifty pounds current money for each slave, "and damages one penny."

with the damages & costs, it is not error.

Bates, vs. Gordon.

On this verdict the court rendered judgment for the slaves if to be had, and if not the price found by the jury with the damages and costs. From this judgment there was an appeal to the General Court.

In October 1786 the cause came on to be heard before the General Court, when the judgment was reversed, as to the price for the slaves and affirmed as to the residue.

To the judgment of the General Court the plaintiff Bates brought a writ of error; and now on a hearing the judgment of the General Court was reversed, and that of the county court affirmed; and it was further ordered, that the appellant Andrew Gordon should pay the costs and damages of the appeal out of the effects of his intestate in his hands to be administered, if there were such effects, but if not that he should pay them out of his proper goods and chattles.

Cases

Argued and Determined

IN THE

COURT OF APPEALS

IN

NOVEMBER TERM OF THE YEAR 1790.

PRESENT:

The Honorable
Edmund Pendleton, *President:*
Peter Lyons, Paul Carrington, William Fleming, & James Mercer,
Judges.

TAYLOR & Co.

against

Mᶜ CLEAN

JOHN Mᶜ CLEAN brought an action of debt in the District Court of Petersburg against Richard Taylor and Co. on a bond for the payment of sterling money. The plea was payment, and the jury found a general verdict for the plaintiff; on which judgment was rendered for the debt in the declaration mentioned. To this judgment a supersedeas was awarded, and the errors assigned were, 1st That no damages were laid in the declaration, or found

In debt on a bond damages need not be laid in the declaration or found by the jury.

It is necessary on judgments for sterling money, that the court should fix the

rate of exchange.

Taylor, & co. vs M'Clean.

by the verdict. 2d. That the court had made no rule fixing the sum in current money, with which the judgment for sterling money might be discharged. The first error assigned, was abandoned.

On the second it was contended for the defendant in error, that the rule, stating the sum in current money by which a judgment in sterling should be discharged, formed no part of the judgment itself. It was usually entered at the close of a term, and was applied, to each particular judgment, by the clerk. The judgment therefore was not erroneous, and ought not to be reversed. An instruction to the sheriff how to serve the execution was alone necessary; and that might be obtained, at the succeeding term before the clerk could issue the execution, should the judgment be affirmed.

But the court reversed the judgment for this defect.

SYME,

against

JOHNSTON.

Equity will not relieve against a purchase, if the seller at the time of the decree is able to make a title.

RICHARD JOHNSTON AND HARRY GAINES purchased in partnership several lots of land for which leases had been given by the college of William and Mary. On dividing their purchase it became necessary to divide one lot called the lot C. E. Application was made to the President and Masters of the College for a lease to each, for his part, which they refused giving, as it was a rule with them, that no lot should be divided. But they agreed to give a lease to either of them, and that they might divide the possession as they pleased. A lease was given to Richard Johnston, and they divided the lot between them by the courses of gravelly run, leav-

ing to Johnston 38½ and to Gaines 68½ acres. It was a condition of the College leases, that the lessee should not give, grant, alienate, sell, assign, or set over his interest or title without having first obtained in writing the assent of the President and Masters for the time being, except only by last will and testament, whereby only the whole premises together and not any part of the same shall be demised and bequeathed.

Syme, v. Johnston,

Richard Johnston by his will dated in September 1771 devised that his college leases should be sold on twelve months credit.

In 1781, his executors proceeded to sell the said lands at public sale; and John Syme junr. who was the proprietor of some adjoining fee simple lands, being the highest bidder, became the purchaser at the price of 115,000 weight of tobacco. No bond having been given, an action on the case was instituted by the executors in the General Court.

When this suit was for trial, John Syme and William Johnston met at the house of Richard Chapman and after much altercation, and a comparison of several college leases, Syme declared himself perfectly satisfied, admitted that he had the quantity of land he had purchased, and agreed to confess a judgment, for such a sum of money as the tobacco, by a person fixed on between them, should be estimated at. The tobacco was estimated at twenty eight shillings per hundred and for that sum, judgment was given. After an execution had issued, Syme applied to and obtained an injunction from the Court of Chancery in October 1786, having stated in a bill, his equity which he alledged was unknown to him, at the time the judgment was confessed.

It appeared that the division of the lot C. E. between Johnston and Gaines was known in the

Syme's vs. Johnston.

neighborhood, that at the ſale of the lots, the executors declared that they ſold them as their father held them, and that there were 432½ acres. During the ſale notice was given by an agent for Walker Tomlin that he claimed a part of the land held under one of the leaſes as belonging to an adjoining tract, which was his property. Mordecai Abraham who was one of the bidders aſked the acting executor William Johnſton, particularly the terms of ſale, and he ſaid that he ſold the lots as his father held them, except the part north of the gravelly run, which was the part of C. E. aſſigned to Gaines, and on being further aſked by Abraham whether he would make good to the purchaſer, the land which Tomlin might recover, he ſaid he would not. There was no public information given by the executors, or by the cryer that any part of the ground ſold was a divided lot, or that Tomlin had a claim to any part of it. John Symet he purchaſer, had reſided in diſtant parts of Virginia, ſo as to exclude a preſumption that he knew one of the lots had been divided. Though not entirely deaf, his ſenſe of hearing was very obtuſe; and thoſe, who ſaw him when Tomlins agent gave notice of his title, declared their belief that he did not hear the notification. His father John Syme appeared to be a partner in the purchaſe, but he did not interfere in any manner, and was not preſent when Tomlins title was announced. There was no proof of the goodneſs of that title, but Tomlin depoſed to his intention to aſſert it. There was ſome proof that the property would not command half the price given for it.

The Preſident and Profeſſors gave the following certificate.

We the Preſident and Maſters of William and Mary College do hereby conſent to, and approve of the ſale made by the executors of Richard Johnſton, of certain leaſes to John Syme the younger

which leaſes bear date the firſt day of February 1765 retaining however the ſaid Johnſtons repreſentatives ſtill bound for the rents and reſponſible for all breaches of the covenants contained in the ſaid leaſes until the ſaid Syme ſhall take new leaſes from us, or otherwiſe bind himſelf, by accepting an aſſignment of the ſaid leaſes in due form.

Syme, vs. Johnſton.

On the 27th day of February 1789, Thomas Fox collector for the College certified on the back of the leaſe C. E. that he would hold the leſſee Johnſton, or his aſſignee only reſponſible, for half the rent, reſerved on the leaſe. And on the 27th, of March 1789, the Preſident and two of the profeſſors ratified this agreement. On the 11th of May 1789 the executors of Richard Johnſton aſſigned that part of the leaſe C. E. which lay ſouth of the gravelly run, to John Syme junr.

In October 1789 the cauſe came on to be heard before the Chancellor who gave the following decree.

"This cauſe came on to be heard &c. on conſideration whereof &c. The court is of opinion, not only that in the ſale of the College lots mentioned in the proceedings, the defendants do not appear to have been guilty of any concealment or other malverſation for which the contract ought to be avoided, but that the plaintiff, after notice, as ſeemeth to the court, of what he alledgeth to have been concealed from him, and after his title to the ſaid lots, might be and were offered to be confirmed to him, had the leſs juſt pretence to apply for relief; more eſpecially as by his intromiſſion at the ſale, he hindered a ſale to ſome other at a price nearly as advantageous as that offered by himſelf, the court doth therefore, order, adjudge and decree, that, the injunction obtained by the plaintiff be diſſolved and his bill diſmiſſed, and that he pay unto the defendants their coſts, but this

Syme, vs. Johnstone,

dismission is to be without prejudice to any relief, which the plaintiff may seek in case of eviction without collusion, of any part of the 432½ acres of land sold by the defendants to the plaintiff. And the court doth further order that the assigned leases, and two papers subscribed by the President and Professors of William and Mary College, which are among the exhibits, be delivered the plaintiff if he will accept them.

From this decree the plaintiff prayed an appeal to the Court of Appeals.

The cause was argued by Taylor and Marshall for the appellant, and by Campbell and Duval for the appellees.

For the appellant it was insisted that the decree was founded on the idea of notice to Syme of the incumbrances on his title and depended on that fact.

That there was no proof of notice except from the answer which does not assert it, since the declaration of satisfaction which the answer states the appellant to have made, and which Chapman proves him to have made, relates merely to the quantity of land, and does not prove that any other ground of objection to the transaction was then known to him.

The answer itself will show that the appellant had no notice of Tomlins claim.

Nor is any notice not expresly proved to be infered from the circumstances of the case and of the parties. The circumstances, from which notice is to be inferred, are that the division of the lot C. E. was known in the neighborhood, and that Tomlins agent did on the day of sale declare his title to a part of the property sold.

The information of the neighborhood cannot affect Mr Syme who was a ſtranger, nor can it be preſumed that he heard the declaration concerning Tomlins title as he was very deaf: and the declaration was not addreſſed to him. The converſation between Abraham and Johnſton was a private converſation not heard by Syme; and, ſo far from affording a preſumption of notice to Syme, it ſerves to ſhew that the public declarations of Johnſton did not reach thoſe points concerning which Abraham enquired. The confeſſion of judgment ought not to affect the caſe, as he does not appear at that time to have had any other objection than to the quantity of land purchaſed, and conſequently that confeſſion can amount in equity only to a waiver of that objection.

Symes equity then, whatever it may be, remains unaffected by notice, either expreſsly proved or to be implied from circumſtances.

Enquire into that equity. It conſiſts of two points.

1ſt. The diviſion of the leaſe.

2d. Tomlins claim.

I. As to the diviſion of the leaſe.

When a particular tract of land is expoſed to ſale, and no incumbrances are ſtated, the purchaſer has a right to believe that no incumbrances exiſt. If the purchaſer knows of theſe incumbrances and yet conceals them, it is a ſuppreſſion of truth, which a court of conſcience conſiders and treats as a fraud. On purchaſing theſe lands Mr. Syme had a right to expect a clear and complete title to the particular lands purchaſed, unmingled with the title or poſſeſſion of any other perſon. Can he ever now obtain ſuch a title. More than half of one of the lots is the property of

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another person. It may be true that notwithstanding this, Mr. Syme has his quantity, but the mere quantity is not the only important consideration in such a purchase. The college leases are subject to a certain rent and are subject to forfeiture, unless certain improvements be made. To the whole of the rent Mr. Syme as the legal proprietor of the lease was liable until so late as March 1789, and is yet liable for the half of it, although he holds but little more than a third of the lot, and for the whole improvements he appear, from the expression of the paper given by Fox and assented to by the college, to be still liable. The lease is forfeitable for alienation otherwise than by devise. It is true that the President and two of the professors who are not a majority, for there are six professors, have sanctioned the sale to Syme, but the lease may be forfeited by a sale of the holders of the other moiety. As the legal proprietor of the land, Syme is liable for all the taxes which may be imposed on it. It is true he has recourse to the proprietor of the other part of the lot, but he did not consider himself as purchasing property which subjected him to the payment of money which he might afterwards recover from another.

These are serious inconveniences, a knowledge of which might have had considerable influence with Mr. Syme in making the purchase. They are inconveniences to which he has not consented to subject himself, and to which Mr. Johnston has no right to subject him, but they are inseparable from a complete and full establishment of the contract. Nor can these objections be got over by establishing the contract, except as to the lot C. E. and annulling it as to that lot, because the court can never split a contract.

II. His title is threatened by Tomlins claim.

Whatever this may be, Johnston had knowledge of it and ought to have proclaimed it. The neces-

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sity for this was the stronger, as he did not mean to warrant the title of the land sold.

That no suit has been brought does not protect Mr. Syme, because the possession being social no length of time will guard him from the claim.

This is in the nature of a bill of *quia timet*, and the court will direct Syme to be secured.

From the price given for the lands and the price at which they could now be sold, being less than half what was given, one of two things must be obvious. Either the contract was at first a very hard one, or the lands before Syme could get even the title which the certificates of the College now give him, had fallen very much in their price. This will induce the court to lay hold of circumstances which might not otherwise be deemed material, to set aside the contract. That Johnston might have sold the land to another for nearly the same money if Syme had not overbid him, and that it is not now in his power to make a similar sale, ought not to affect the case, because the loss ought to fall where the fault has been; and in this case the fault is in Johnston who did not openly and publicly proclaim the state of his title to the property sold.—*Brown* 148,—2 *P. Wms.* 201.—3 *P. Wms.* 190.

For the appellees it was urged that there were circumstances in the case which raised against Mr. Syme a strong presumption of notice at the time of the sale. Having come to a public sale determined to purchase the land which was contiguous to his own estate, he must be considered as having made enquiries concerning the property he designed to acquire. The whole neighborhood knew that the lease was divided, and a part of it was in the actual possession of the person entitled to it. In ad-

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dition to this his father was a joint purchaſer with him, who might be ſuppoſed to be informed of the ſtate of the property. If he did not hear Tomlin's claim announced, he was in a circle of his friends bidding for the land, and it was not likely that no one of them ſhould inform him of it. Declarations of that ſort at a ſale are always the ſubject of general converſation, and are certain to be mentioned to a bidder, eſpecially one known to be deaf. Johnſton could not have ſuppoſed it neceſſary for him to proclaim Tomlin's title, ſince Tomlin had proclaimed it himſelf, and Syme might as well be ſuppoſed not to have heard Johnſton as not to have heard Tomlin's agent. The nature of the ſale ſhould have put every purchaſer on his guard. The ſale was made by an executor who only profeſſed to ſell the right of his teſtator. Syme then ought to have made particular enquiries into the nature of the property, and there is no reaſon to ſuppoſe that Johnſton conſidered him as not hearing what others heard, becauſe Johnſton did not know him, and could not know that he was deaf. But certainly in October 1785, when Syme confeſſed a judgment, he ought to have been acquainted with the property he had purchaſed. Every defence which is made in this court could have been made at law, and therefore the confeſſion of Judgment will bind Mr. Syme, unleſs he ſhews that at that time he was unacquainted with circumſtances which, from the time that had elapſed, he muſt be ſuppoſed to have known.

But if he had not notice, ſtill under the circumſtances of the caſe there is no ground of application to this court. Johnſton does not appear to have intentionally concealed any thing. No fraud therefore is aſcribable to him. There is in the caſe no fact, which with that degree of uſual enquiry which common prudence dictates to purchaſers, Mr. Syme might not have been poſſeſſed of In this caſe, as the ſale was made by an executor. who ſold, as he ſaid, only the right of his teſtator,

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the principle of *caveat emptor* applies with peculiar force. Under this impreſſion the incumbrances on the land ought to be examined. The clauſe in the leaſes would probably authoriſe a ſale made in purſuance of a will. If it will not, ſtill the Preſident and profeſſors, have ſanctioned it by their after act. The diviſion of the leaſe is alſo ſanctioned. The certificate in March 1789 amounts in ſubſtance to a complete ſeparation of the leaſe, and would certainly diſable the college from reſorting to the poſſeſſor of the ground on one ſide of gravelly run for any thing whatever on account of the ground on the other ſide. The proportion of taxes may be made payable in the firſt inſtance by the holder of the other part of the lot by entries on the books of the commiſſioners, and ſhould the proprietor refuſe ſo to do, Mr. Syme having the legal title may eject him, and hold him out till he ſhall comply with ſuch conditions as a court of Chancery ſhall deem equitable. There is now then a complete title, and if a complete title can be made at the time of the decree it is ſufficient. 2 *Pow.* 630.

Gravelly run muſt be conſidered as dividing the lot equally in point of value, though unequally in point of quantity, as it is a diviſion made by conſent, and there is no proof or allegation of inequality of value.

LYONS Judge delivered the opinion of the court

After ſtating the caſe, he ſaid, that the court conſidered the declaration of the executor, that he ſold only as his teſtator held, as impoſing on the purchaſer the neceſſity of enquiring into the ſtate of the property. That there having been no refuſal to inform on the part of the executors, or any evaſion whatever, the court did not conſider him, after his general declaration, as having been guilty of any fraudulent concealment which could affect the contract. That gravelly run ought, as there was no teſtimony to the contrary, to be conſidered as dividing the lot equally: And that

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the agreement to confeſs judgment, in a ſuit in which the fraud of the contract, had there been any, was examinable, and the declaration of the defendant at law, on that occaſion, that he was ſatisfied, made after he muſt be preſumed to have been acquainted with his equity, amount to a confirmation of the contract, which ought to bind him.

The decree was affirmed.

ROSS,

against

PINES.

A court of equity will not grant a new trial, merely becauſe the judges certify that the weight of the evidence was againſt the verdict.

PINES brought an action againſt Roſs for ſlandering his title to ſome ſlaves; and upon the trial of the cauſe obtained a verdict and judgment for £.500 damages. The Court of Chancery granted an injunction, and awarded a new trial, before the Diſtrict Court, with leave to the plaintiff to amend his declaration. On the ſecond trial there was a demurrer to the defendants evidence by the plaintiff and the jury found a verdict for £. 1000. *(Vid. Wythes reports 71.)* The Diſtrict Court, gave no judgment on the demurrer; but certified "that the weight of teſtimony on the trial of the iſſue, was on the part of Roſs, and therefore that the verdict was not ſatisfactory to the court." The Court of Chancery, upon the return of the verdict, being of opinion, that as the loſs in the ſale of the ſlaves was attributable to Roſs, he ought, although as he was believed to have deſigned no injury, to make reparation; and as the meaſure of that reparation, obſerved in the firſt verdict, had been more than approved by the ſecond, diſmiſſed the bill with coſts. From which decree Roſs appealed to this Court.

This cauſe was argued by Baker and Marſhall for the appellant and by Taylor for the appellee.

For the appellant it was inſiſted.

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That the original verdict having been notoriouſly obtained on an exparte hearing which the defendant at law could not have prevented as he could not have had notice of the illneſs of his only material witneſs, the cauſe came properly into Chancery for relief againſt that verdict. Being thus properly in a court of Chancery the decree which was made on the hearing might perhaps have been final and the cauſe returned to a court of law, for a new trial and judgment at law, in which caſe the court of common law could have controlled the verdict, or it might direct as it has directed, the verdict to be certified to the court of Chancery in order to enable the chancellor to give a final decree. When the verdict is to be returned to that court, it has all the qualities of an iſſue directed out of chancery, and its object is to imform the conſcience of the judge on ſome fact about which he doubts or to aſcertain damages which himſelf cannot aſcertain.

It is a ſettled principle that the opinion of the court muſt in ſome degree concur with that of the jury in order to give the conſcience of the chancellor the ſatisfaction he requires. 2. *Eq. ca. ab.*

This rule is founded on ſound reaſon and policy. The trial by jury, which under its preſent modification we ſo juſtly prize, would become dangerous and might poſſibly deſtroy itſelf, if the ſuperintendance and reaſonable control of judges was entirely removed Juries might ſometimes be led by the moſt unlimited prejudices into ſuch extravagant exceſſes as would render it doubtful, whether the inſtitution ſhould be conſidered as a bleſſing or a curſe. The wiſdom of the law therefore to preſerve all the excellence of a trial by twelve honeſt and impartial men, without the ills which would otherwiſe attend it, has ſubjected their verdict to the opinion of Judges ſelected for

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that purpoſe. This controlling power tempers the exceſſes and checks the miſtakes which juries may ſometimes commit.

It is as neceſſary that this controlling power ſhould exiſt over iſſues proceeding from a court of Chancery, as over thoſe originating in a court of law. Was it not to exiſt, it would be as proper to try the fact in the uſual manner, in which an inqueſt of office is taken, as in a court of law. It would ſeem to be treating the law judges indecently to ſend a fact to their bar for trial, to oblige them to ſet during the trial, and yet to leave nothing to their opinion.

So long as the verdict of a jury on an iſſue directed out of Chancery may be as contrary to evidence, as the verdict of a jury on an iſſue made up in a court of law, the opinion of the judge who ſits on the trial muſt be as important; and ought to be as operative in the one caſe as in the other. In this caſe the demurrer does not derogate from the importance of the opinion certified by the judges at law, becauſe it does not contain the teſtimony offered on the part of the appellant.

Unqueſtionably then the opinion of the court, if ſo expreſſed as to be deciſive againſt the verdict, ought to procure a new trial:

The words of the certificate are: "Ordered, that it be certified to the High Court of Chancery, as the opinion of the judges of this court, that the weight of teſtimony on the trial of this iſſue was on the part of the defendant, and therefore that the verdict was not ſatisfactory to the court."

No form is preſcribed to be uſed by the judges of law who certify their opinion to the Chancellor. It is only neceſſary that their opinion ſhould be plainly and intelligibly expreſſed.

Had this been a caſe finally determinable at law, the judges if entirely diſſatisfied with the verdict could have granted a new trial. Not having the power to grant a new trial, they can only certify their opinion to that court which poſſeſſes the power, and if their opinion is to have any weight, the judge to whom it is certified ought to act upon it, as they would have acted, had the power of granting a new trial been in them. It can ſcarcely be doubted but that the judges who gave the certificate in this caſe would have granted a new trial, had it been in their power; and if ſo, the chancellor ought not to have been ſatisfied with the verdict.

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It was alſo contended that the teſtimony did not ſupport the iſſue, and that the letter contained no ſlander, but rather the reverſe as it evidenced the conviction Mr. Roſs felt of the goodneſs of the title, and might be a neceſſary caution to his agent, not to be deterred from purchaſing, by any report he might hear on that ſubject.

It was alſo contended that the demurrer ought to have been decided at common law.

For the appellee it was inſiſted, that the demurrer on the part of Mr. Roſs was improper, as in this caſe, the whole ſubject ought to have been adjudged of by the jury, ſince it was not the object of the Chancellor, when he directed a new trial, to inquire whether the letter written by the appellant was actionable or not. But be this as it may, a demurrer to evidence admits the utmoſt force which can be given to that evidence, and certainly the letter of Mr. Roſs might be conſtrued into a ſlander on the title, ſince it was actually ſo conſidered by thoſe who ſaw it, and produced doubts concerning the title, which otherwiſe would have had no exiſtence.

The action being maintainable, and an injury poſitively proved, the only queſtion for the jury

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was, the amount of the damages. This depended on circumſtances fully and properly cognizable by a jury, and in ſuch caſe a court ſhould not lightly grant a new trial, 1 *Bur.* 609.

Here have been two verdicts: If the firſt trial was even by ſurprize, the ſecond was not; the parties were fully prepared, and had a fair hearing. The witneſs whoſe abſence produced the injunction was preſent at the laſt trial, and the damages are doubled. This would ſeem to do away any objection to the firſt verdict, and then we have two unexceptionable verdicts in favor of Pines. Under ſuch circumſtances a new trial ought not to be granted on ſuch a certificate as has been given. The verdict is not ſaid to be againſt evidence, but that the weight of teſtimony was in favor of Roſs. Jurors weigh teſtimony, eſpecially in actions which ſound merely in damages, but it does not follow that a ſecond new trial ſhould be granted. Here was teſtimony on both ſides, and, in the opinion of the judges, the ſcale might have preponderated but a very little in favor of Roſs. On this account the verdict was not ſatisfactory to them. But if in an action founding merely in damages, the amount of which can be meaſured by no exact ſtandard and on which all men will think ſomewhat differently, no verdict can ſtand which is not preciſely ſatisfactory to the court, juries become totally uſeleſs and had better at once be diſpenſed with. It is transferring, from the jury to the court, the power of aſſeſſing damages. For, if a court will perpetually grant new trials until a completely ſatisfactory verdict is obtained, the effect is the ſame, as if the court, without the intervention of a jury, ſhould decide the cauſe and aſſeſs the damages.

Mr. TAYLOR alſo contended that inſtead of diſmiſſing the bill, the Chancellor ought to have ordered Roſs to pay the amount of the laſt verdict.

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The Preſident who delivered the opinion of the court ſaid, it is certainly proper that the judges before whom the cauſe was tried ſhould certify their opinion of the verdict. The only queſtion is whether on ſuch a certificate as this, the court ought to grant a new trial. By one party it is contended that juries ought not to become mere cyphers, and on the other, that it would be extremely inconvenient to give the court no control over their verdict. This is true; but if the court may continue to grant new trials till the verdict conforms to its opinion, juries are uſeleſs. The court is therefore of opinion, that, on ſuch a certificate as this, a new trial ſhould not be granted.

With reſpect to the demurrer, the court thinks the principle laid down in the decree of the chancellor a juſt one. For a real injury compenſation ought to be made.

With reſpect to the damages the evidence does not ſhow the amount; but this being a tort the jury was not bound by exact calculation. The increaſe of damages in the ſecond verdict might be produced by ſudden paſſion, which in this caſe it was proper for the Chancellor to moderate, and to take that ſum which two juries had affirmed.

The decree was affirmed.

The Rev. JOHN BRACKEN,

againſt

The Viſitors of Wm. & Mary College.

The viſitors of Wm & Mary College have power to change the ſchools, and put down profeſſorſhips.

WILLIAM AND MARY in the fourth year of their reign, granted a charter of incorporation to Francis Nicholſon and others for the foundation of a college in Virginia, to bear their name.

A writ of *mandamus* will not lie in the caſe of a private Eleemoſynary foundation, if there be a viſitor.

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The introductory part of the charter is in theſe words: "For as much as our well beloved and faithful ſubjects conſtituing the General Aſſembly of our colony of Virginia, have had it in their minds, and have propoſed to themſelves, to the end that the church of Virginia may be furniſhed with a ſeminary of miniſters of the goſpel, and that the youth may be piouſly educated in good letters and manners, and that the chriſtian faith may be propagated among the weſtern Indians to the glory of Almighty God, to make, found and eſtabliſh, a certain place of univerſal ſtudy or perpetual College of divinity, philoſophy, languages, and other good arts and ſciences, conſiſting of one preſident, ſix maſters or profeſſors, and an hundred ſcholars, more or leſs, according to the ability of the ſaid College and the ſtatutes of the ſame, to be made, increaſed, diminiſhed or changed there by certain truſtees mominated and elected by the General Aſſembly aforeſaid, to wit: Our faithful and well beloved Francis Nicholſon &c, gentlemen, or the major part of them, or of the longer livers of them on the ſouth ſide of a certain river &c."

The firſt ſection of the charter "grants that the ſaid Francis Nicholſon and others, or a major part of them, or of the longer livers of them, for promoting the ſtudies of true philoſoply, languages, and other good arts and ſciences and for propagating the pure goſpel of chriſtianity only mediator to the praiſe and honor of Almighty God, may have power to erect, found and eſtabliſh a certain place of univerſal ſtudy or perpetual college, for divinity, philoſophy, languages and other good arts and ſciences, conſiſting of one Preſident, ſix maſters or profeſſors, and an hundred ſcholars, more or leſs, graduates and non graduates as above-ſaid, according to the ſtatutes and orders of the ſaid College, to be made, appointed and eſtabliſhed upon the place by the ſaid Francis Nicholſon, &c. or the major part of them, to continue for all times coming."

The second section enables the trustees to take property real and personal, and to transfer it to the President and masters, or professors of the College.

The 4th section gives to Francis Nicholson and others, and their successors, or the major part of them, power to elect and nominate other fit persons into the places of the masters or professors of the said College; and that after the death, resignation, or deprivation of the said President or professors, or any of them, the said Francis Nicholson, &c. and their successors, or a major part of them, shall have power to put in and substitute a fit person or persons, from time to time, into his or their places according to the orders and statutes of the said College to be made, enacted and established for the good and wholesome government of the said College, and of all that bear office or reside therein by the said Francis Nicholson, &c. or their successors or the major part of them.

The 5th & 6th makes the President and masters or professors and their successors a body politic and corporate, with power to sue and be sued, and to take property of every sort.

The 9th section constitutes the said Francis Nicholson, &c. and their successors, true, sole and undoubted visitors and governors of the said College, for ever; with full and absolute liberty, power and authority of making, enacting framing and establishing such and so many rules, laws, statutes, orders and injunctions, for the good and wholesome government of the said College, as by the said Francis Nicholson, &c. and their successors shall, from time to time, according to their various occasions and circumstances seem most fit and expedient. All which rules, laws, statutes & injunctions so to be made as aforesaid, we will have to be observed under the penalty therein contained: Provided notwithstanding, that the said rules, &c. be no way contrary to our prerogative royal, nor to

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the laws and ſtatutes of our kingdom of England, or our colony of Virginia aforeſaid, or to the canons and conſtitution of the Church of England, by law eſtabliſhed.

The 12th, ſec. enables the viſitors to convocate and hold a certain court on convocation where they may treat, confer, conſult, advise and decree, concerning ſtatutes, orders and injunctions for the ſaid college.

The 15th, Sec. Gives to the truſtees a revenue on tobaccoes exported, to be transfered by them to the Preſident and Maſters or profeſſors.

The 16th. Sec. Confers on the truſtees the office of ſurveyor general, to be transfered to the Preſident and maſters or profeſſors.

The 17th, confers a large quantity of land.

The 18th, Sec. Gives the Preſident and Maſters, and their ſucceſſors a right to elect a member to repreſent them in the Aſſembly of Virginia.

On the 27th day of Frebruary in the 2d year of the reign of George 2d (1728) James Blair and Stephen Fouace, the ſurviving truſtees transfer the College property to the Preſident and Maſters, or profeſſors of the College.

Sundry ſtatutes were enacted, which are certified under the College ſeal and completed by James Blair add Stephen Fouace, the major part of the ſurviving truſtees on the 24th day of June 1727.

One of theſe ſtatutes, having recited the intentions of the founders of the college, proceeds thus, "For carrying on theſe noble deſigns, let there be four ſchools aſſigned within the college precincts, of which together with the maſters or profeſſors belonging to them ſome directions muſt be given.

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"The GRAMMAR SCHOOL. To this ſchool belongs a ſchool maſter, and if the number of ſcholars requires it, an uſher. The ſchool maſter is one of the ſix maſters of whom, with the Preſident and Scholars, the college conſiſt."

In this Grammar School, let the latin and greek tongues be well taught.

A ſtatute concerning the ordinary government of the college, enacts, that it ſhall be in the Preſident and ſix maſters, viz. the two profeſſors of divinity, and the two profeſſors of philoſophy, and the maſter of the grammar ſchool, and the maſter of the under ſchool.

The laſt ſtatute contains the following clauſe.—"For as much as the yearly income of the college for the preſent, is ſo ſmall, that it cannot anſwer all the above appointed ſalaries and the other things that there will be occaſion to expend. Many things are from time to time to be left to the diſcretion of the governors of the college; that according to the circumſtances of the college for the time being, they may entirely cut off ſome ſalaries, particularly thoſe of the Hebrew profeſſor and the urſher of the grammar ſchool; and for a time may leſſen the ſalaries of ſome other profeſſors and maſters, in proportion to their ſervice and reſidence, but when the college revenues increaſe and will bear it, they are all to be fully and timely paid."

After approving and confirming the foregoing ſtatutes, is this reſervation: "Reſerving notwithſtanding the power given by the charter to the viſitors and governors of the ſame college, namely that proceeding regularly, they may add new ſtatutes, or may even change theſe, as their affairs and circumſtances may from time to time require."

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The Aſſembly of Virginia had paſſed acts granting to the college a duty on hydes, and ſkins and furs, exported, and on ſpirits and wine imported into this country.

The ſtatutes for the government of the college and all the proceedings of the viſitors are read and confirmed at a ſecond meeting.

At a meeting of the Viſitors on the 3d of December 1779, leave was given to bring in a ſtatute for reforming the college.

At a meeting of the viſitors on the 2d of September 1782, the following reſolution was entered into:

The proceedings of a convocation held on the 4th of December 1779, and alſo the proceedings of another convocation held on the 27th of March 1780, not being recorded, which circumſtance renders it uncertain whether the former have been approved, and prevents any meaſure being taken on the latter: Reſolved, that the rector be deſired to cauſe the clerk of this convocation to draw up the proceedings of the ſeveral convocations aforeſaid, at full length, in order that they may be laid before the meeting of the next meeting.

At a meeting on the 26th of March 1784, the following reſolution was adopted.

Whereas a ſtatute for reforming the college was paſſed by the convocation on the 3d of December 1779, and was again read and confirmed on the day next following, which ſtatute through the neglect of the clerk was not recorded, and the ſtatute itſelf has been ſince loſt, but the material parts were publiſhed in the gazette at the time, agreeable to the following extract: And whereas ſuch of the members now preſent as were in convocation at the time of paſſing the ſaid ſtatute do perfectly remember that the original was ſtrictly agreable to

the ſaid tranſcript, Reſolved therefore, that the following, viz. "At a convocation, &c. (here follows the ſtatute as publiſhed at the time of its paſſage in the gazette) be now recorded as a juſt extract from the ſtatute paſſed on the ſaid 4th of December 1779.

"In that ſtatute are, among others, the following clauſes. Let there be therefore ſix profeſſorſhips, the firſt of which ſhall be law and police; the 2d anatomy and medicine; the 3d natural philoſoply and mathematics; the 4th moral philoſoply, of nature and of nations and the fine arts; the 5th the laws modern languages, and the 6, for Brafferton."

The grammar ſchool ſhall be diſcontinued.

Tho this is termed an extract from the ſtatute in the reſolution of March 1784 tis in its form obviouſly a complete ſtatute.

At a meeting of the viſitors on the 1ſt of April 1777, Mr. Bracken was appointed grammar maſter and profeſſor of humanity. He was removed by the ſtatute of the 4th of December 1779, and, in October 1787, a rule was made in the General Court on the governors or viſitors of the College, to ſhow cauſe on the third Saturday of the following term, why a writ of *mandamus* ſhould not be awarded, to cauſe them to reſtore Mr. Bracken to his place and office of grammar maſter and profeſſor of humanity.

Counſel having been heard, the caſe was adjourned, on account of difficulty, to this court.

MARSHALL, for the College. Contended,

1ſt. That a *mandamus* was not grantable in ſuch a caſe as this: And,

2dly, If the court could take juriſdiction, ſtill a *mandamus* ought not to be granted, becauſe the viſitors or governors had not exceeded the powers given them by the charter.

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The court have no juriſdiction of the ſubject in the form the caſe now wears, becauſe this is a meer eleemoſynary inſtitution, with viſitors appointed for its government and direction. 1 *Ld. Raym.* 8. *Comb.* 143. 1 *Black. rep.* 82. *Sir T. Jones* 175. *Hard.* 218. *Andrews* 174. *and* 1 *Bl. Rep.* 24. [Mr. Marſhall was here ſtopped, and the poſition that a *mandamus* will not lie in the caſe of a private eleemoſynary inſtitution where viſitors were appointed, was admitted to be law.]

This is an eleemoſynary inſtitution. It comes completely within the deſcription of chief juſtice Holt in the caſe of *Philips* vs *Bury* 1 *Ld. Raym.* 8. It is founded on charity. That the donations proceeded from the King and from the government is perfectly immaterial, as viſitors are appointed. Colleges are conſidered as meer eleemoſynary inſtitutions, as entirely as hoſpitals, *Comb.* 268.

But if the court have juriſdiction, it ought not to iſſue a *mandamus*, becauſe the viſitors have not exceeded the powers given them in the charter.

The charter eſtabliſhes one Preſident and ſix maſters or profeſſors for divinity, philoſophy, languages and other good arts. It is not neceſſary, under the charter, that a grammar maſter ſhould form a part of the ſyſtem. The profeſſor of modern languages ſatisfies its requiſitions. The viſitors or governors have power to make ſuch laws for the government of the college, from time to time, *according to their various occaſion and circumſtances*, as to them ſhould ſeem moſt fit and expedient. The reſtraining clauſe annexed, ſerves to ſhew the extent of the grant. "Provided that the ſaid laws &c. be no way contrary to our prerogative royal, &c." Their power of legiſlation then extended to the modification of the ſchools in any manner they ſhould deem proper, provided they did not depart from the great outlines marked in the charter; which are divinity, philoſophy,

and the languages. It was proper that this diſcretion ſhould be given to the viſitors, becauſe a particular branch of ſcience, which, at one period of time would be deemed all important, might at another be thought not worth acquiring. In inſtitutions therefore, which are to be durable, only great leading and general principles ought to be immutable.

If then the viſitors have only legiſlated on a ſubject upon which they had a right to legiſlate, it is not for this court to enquire, whether they have legiſlated wiſely, or not, and if the change ſhould even be conſidered as not being for the better, ſtill it is a change; ſtill the grammar ſchool is lawfully put down; and there can be no *mandamus* to reſtore a man to an office; which no longer exiſts. One of the ſtatutes, enacted by the truſtees themſelves, authoriſes the viſitors to change even thoſe very ſtatutes, one of which creates the grammar ſchool.

JOHN TAYLOR *contra.* The merits of the caſe ariſe out of the charter of William and Mary College; and I ſhall endeavour to prove, 1ſt that the college is a corporation for purpoſes of further government. 2d, That the viſitorial power is defined and limited by, and ſubordinate to, the charter, transfer, and original ſtatutes. 3d, That this viſitorial act exceeded their power.

I. The charter is the magnet, from whence every part of this buſineſs muſt take its direction. It is the conſtitution of the college, and, like all other conſtitutions, ought to be preſerved inviolate. In this inſtance it muſt be preſerved inviolate for the benefit of all parties, becauſe its deſtruction will take from both ſides the ſubject of controverſy. A nation may violate its conſtitution, and erect another; but a ſubordinate body politic can do no ſuch thing. Theſe have particular

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members poſſeſſed of rights, in the enjoyment of which every member is protected, in every kind of government. What ſuch rights are, in this caſe, is to be learnt from the charter. This charter is addreſſed to Francis Nicholſon and ſeventeen other perſons. It ſtates its intention to be, "to make, found and eſtabliſh, a certain place of univerſal ſtudy, or perpetual college of *divinity*, philoſophy, and other arts and ſciences, conſiſting of a preſident, ſix *maſters* or profeſſors, &c." When we go into the charter we ſhall find it drawn with peculiar care, and worded with the moſt exact preciſion; we ſhall find, that it fixes ſome things unalterably; that it delegates the fixing of other things, to the ſaid Nicholſon and others, or the *survivor*, excluding ſucceſſors: And that it delegates a power of forming regulations from time to time, as to things not abſolutely determined, to the ſaid Nicholſon and others, and their *ſucceſſors*.

II. From theſe materials I am to prove that the viſitorial power is defined and limited by, and ſubordinate to, the charter, transfer, and original ſtatutes: And it muſt be ſo, if there is any thing fundamental in the college conſtitution. This charter erected three branches of government, for the body politic and corporate, to which it gave exiſtence, whoſe rights were ſeparate and diſtinct, and in moſt inſtances independent of each other; 1ſt, The truſtees, 2d, The viſitors and governors; 3d, The preſident and maſters. Theſe three eſtates are in fact created by the ſame inſtrument; for altho the maſters were not nominated in it, yet the truſtees could have been compelled in chancery, by a proceſs in the name of the attorney general, to have proceeded to a nomination. In this, as in all other things relating to their truſt, they had a bare and naked power, which they were obliged to purſue ſtrictly, and ſo ſoon as they had executed it. the maſters were erected into a body politic and corporate, and derived their rights from the charter itſelf, and not from the truſtees: The charter then creates three collateral branches;

and to ſuppoſe that one creature of a political regulation, has a right to deſtroy another creature of the ſame political regulation, is a doctrine diametrically oppoſite to the fundamental maxims of our preſent and former government. A houſe of commons or a houſe of delegates, may impeach a member of their own, or other orders, as a maſter might be tried and deprived before the order of viſitors, but the order of viſitors are no more intitled to annihilate the order of maſters, becauſe they can try a member of that order, by virtue of their ſpecial viſitorial powers, than the houſe of lords could aboliſh the houſe of commons, becauſe they can try a member of that order, in virtue of the powers annexed to their own order.

The viſitors, as to the nomination of the maſters, ſo as to keep up the ſucceſſion of that body politic and corporate, were alſo truſtees, and might have been compelled, either by mandamus, or in chancery, to proceed to ſuch nominations. Otherwiſe it would be in their power to deſtroy this incorporated ſociety at any time, altho all the powers intruſted to them, were intended to ſupport it — Whence do the viſitors derive any authority to act at all in that character? From the charter. If therefore their acts are not warranted by that charter, they are void; becauſe they can derive their obligation from no other ſource. This obſervation is concluſive: As the viſitors could not create, neither could they annihilate. In the creation, the crown uſed the medium of truſtees. It was neceſſary that the work of the truſtees ſhould be completed, before the viſitors could act at all.— The very term *viſitors* implies ſo much— Something was to be viſited. This ſomething was the College eſtabliſhment, as fixed by the charter and the truſtees. It was to be viſited, for the purpoſe of ſupporting it, according to the laws of the founder, not for the purpoſe of ſubverting thoſe laws. I am therefore clear that the viſitorial authority deriving its exiſtence from, is limitted

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by, and ſubordinate to, the charter, transfer, and original ſtatutes.

III. The next queſtion is, whether the viſitorial act of 1779 exceeds their powers as limited by the charter?

Every word of this inſtrument proves, that it was intended to be, as if valid it would be, an utter and entire abolition and abrogation of the college conſtitution.

The preamble gives the reaſons for granting this new charter; one of which, "that the rarer parts of ſcience are more immediately ſubordinate to the leading objects of ſociety," the original founders of the college ſeem not to have had in contemplation.

This new inſtrument, does either expreſſly, or virtually, repeal the old charter or conſtitution of the college, in a variety of inſtances.

1. The old charter has the ſupport of Religion for an object.—The modern one deſerts it.

2. The old conſtitution appoints a profeſſor of religion.—The modern one exchanges it for the "rarer parts of ſcience as more immediately ſubordinate to the leading objects of ſociety."

3d. The old charter eſtabliſhed a grammar ſchool to teach the ancient languages.

The modern one barters theſe for the modern languages and the fine arts.

4th. Under the old charter, the maſters held large eſtates, a right of repreſentation in the legiſlature, fixed ſalaries, and were a body corporate: nor could any individual loſe theſe rights, except by "death, reſignation, or deprivation."

By the new, he holds them at the will and pleasure of the visitors, and may be dismissed without any reason whatsoever.

5. By the old charter, the college, as then established or erected, was to subsist for ever.

By the new one, its existence is determined, and if in the revolution of things, the visitors should incline to erect it into a Turkish mosque, here is a precedent for it.

6. By the old constitution, the trustees only had power to erect schools, or appoint professorships.

Under the new one, the visitors *assume* this power, and exercise it.

The trustees, under the old charter, convey to professors of theology and the master of the grammar school, who then, under the *charter*, are to hold to them and their successors.

The new regulation breaks this succession.

The college estates were vested in certain professors.

Where are they now?

This act, then, of the visitors, in 1779, being subversive of the charter, is a nullity; and, of course, cannot deprive the plaintiff of his rights under the charter.

The visitors have undertaken to do, what the original trustees could not effect. They had the power of nominating the first masters, as the visitors have the power of nominating to vacancies. The term nomination, which is used, proves that this was a trust when nominated, the master became a member of the body corporate, not in virtue of the nomination, but under the charter. He

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held his freehold not from the visitors, but under the charter.

When a nomination was made, either by the trustees or visitors, they could not rescind this nomination; because, having executed a power, the object of that power was completely effected. The trustees had also a power of receiving donations, and conveying them to the masters. They executed this power, and made the conveyance. Could they have rescinded it, and revoked the execution of this power? and if the execution of one power is irrevocable, what differs the execution of another power from it?

I have said, that the master, once nominated, is in under the charter; and the nature of his office, shews that he is in of an estate for life. 1st, Because his office has somewhat the complexion of a judicial one. 2d, Because he elects a representative to the General Assembly. 3d, Because he is a member of a corporation, which is to be perpetual. 4th, Because this corporation is to be kept up by succession; and the succession is not to take place except in case of death, resignation or deprivation. 5th, Because deprivation is a technical term: In all law glossaries it is explained to be, the result of some delinquency, or good cause, after previous summons and trial; without which, deprivation cannot take place. Thus, not only from the nature of the office, but from the express words of the charter, it is an office during good behaviour. 6th, Because he is seised jointly with the other masters, of extensive freehold estates, which are estates for life. 7th, because the masters are as a corporation invested with the office of surveyor general, which is an office held for life: Nor are the visitors at liberty to garble the joint possession of that important office, or change the members, without any cause, or any delinquency.

The very right of voting, shews that it is an office for life; not to be lost, except by the parties own act.

The visitors seem wholly to have mistaken their office. They seem to have considered themselves as the incorporated society; and the President and masters as an appendage depending upon them: Whereas the President and masters form the body politic, for the government of which, not for its annihilation, the visitors are to form rules.

If it were otherwise, the body politic, consisting of the President and masters, were under a government as completely tyrannical, as human cunning could have formed; in which, not even a sham trial, not even a detestable *quo warranto*, was necessary to rob the whole body of its rights and privileges. The *fiat* of the visitors—"Let the grammar school be discontinued," Let all the schools be discontinued; Let the grammar master be dismissed; Let all the masters be dismissed; Let there be light and there was light:" The *fiat* of the visitors, in a moment, in the twinkling of an eye, was to deprive the whole body politic, not only of their political existence, but perhaps of their natural existence, by reducing them to a state of beggary.

But the President and masters were a lay corporation, having rights, privileges and emoluments, of which they could not be deprived; at least, without some form of trial,

There is one argument to show the nature of the powers possessed by the visitors, which is very clear.

By the constitution of the college, the visitors were to make statutes for the *government* of the college; not for its erection or abolition: But these statutes were to be observed under *certain penalties*. Statutes to be enforced *by penalties*, were the species of rules, which alone the visitors are empowered to enact. Now fundamental constitu-

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tional laws, are never enforced by penalties; the ſubordinate rules for good order and government often are.

The conſtitution of Virginia has ſaid, "Let there be three branches of government, legiſlative, executive and judiciary:" But this rule is not enforced by a penalty, becauſe it is fundamental; and therefore a penalty cannot be inflicted for its breach, as having no individual to operate upon. The ſubordinate rules for good government call in the aid of penalties. Treaſon ſhall be puniſhed by death, and miſbehaviour before this court by fine. In like manner, the conſtitution of the college has ſaid, "let there be a grammar ſchool; let there be viſitors; and let there be a profeſſor of religion." Theſe rules, being alſo fundamental, are not enforced by penalties; but the viſitors might have enacted, that a grammar maſter ſhould not be guilty of inebriation, under the penalty of £ 5; or that the profeſſor of Religion, ſhould not be guilty of profaneneſs, under the penalty of five ſhillings; and this would have been within their province.

Now the rules of December 1779, are fundamental in their nature, being laws of annihilation or of eſtabliſhment. Theſe are therefore not enforced by penalties; and being fundamental, and not needing penalties, are not ſuch as the conſtitution of the college enables the viſitors to enact. In anſwer to this, it may be argued, that the viſitors are empowered by the original ſtatutes, to make ſtatutes of the ſame kind, becauſe they could alter them without the conſent of the Chancellor, an eſſential not attended to in the act of December 1779, and that theſe ſtatutes are not enforced by penalties.

Altho fundamental laws are never enforced by penalties, it does not follow, that all ſubordinate rules ſhould be. The rules of deſcents and diſtri-

tution are ſubordinate rules, yet they are not enforced by penalties. Theſe original ſtatutes are not fundamental: They are ſubordinate. The ſchools and profeſſorſhips were fundamental; and had been previouſly eſtabliſhed. Theſe ſtatutes are rules of government, not of eſtabliſhment.—Inſtance the grammar ſchool. Mr. Camm was reſtored in England; which proves that the viſitors may exceed their powers.

As to the merits, I will conclude with this obſervation. That the viſitors can only nominate to profeſſorſhips, in caſe of vacancy; and that this vacancy muſt be by death, reſignation, or deprivation. Now Mr. Bracken is neither dead; nor has he reſigned; nor has he been deprived: For the laſt term involves a perſonal ſummons, or trial.

If it did not, if this was not the meaning of the term deprivation, yet this proceeding has only ſaid that the grammar ſchool ſhall be diſcontinued. Now a deprivation, by implication, of an office for life, a freehold, and a conſiderable ſalary, would be a phenomenon in law.

For theſe reaſons, I conclude that this viſitorial act of 1779, ſo far from being warranted by, is ſubverſive of, the college charter, and that it exceeds any viſitorial power.

The act of 1779, therefore, being void, nothing exiſts to deprive Mr. Bracken of his ſalary or his office.

The act is void for other reaſons. There was not a ſufficient number of members to form a convocation. Upon every principle of natural juſtice Mr. Bracken ought to have had notice that he might have defended himſelf. They have deprived him of his office without hearing him. This alone would invalidate the act, *Strange* 557. It ought to appear that every member of the college ſenate was ſummoned 2 *Str.* 1051. But it is con-

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tended that, however improper the conduct of the visitors may have been, a *mandamus* cannot be resorted to because this is a meer private eleemosynary institution, by no means concerning the public, and visitors are appointed for its government.

If this be such an institution as those, concerning which the cases have been cited, the law would be admitted, but it is not such an institution.

In this the public is very materially concerned. Large landed estates are vested in the professors, who have a freehold interest in those estates. It would be strange indeed if they could be deprived of them by the meer will of the visitors, and could have no relief in this court.

The acts of Assembly, which give a revenue to the college arising from certain duties, convert it into an object of public concern.

It is, in many respects in its origin, a corporation for public government, and whose proceedings must therefore be subject to the control of this court.

It has a right to a member of Assembly. This is a political privilege which concerns the nation at large, and partakes nothing of the qualities of a private charity. The masters have a right to vote for this member. Can they be deprived of that vote, and yet this court have no superintendance over the subject?

They have the office of the surveyor general; and having that office, appoint all the surveyors to the different counties throughout Virginia. This is an office which nearly concerns the public, and gives to the college completely a public character.

In the cases too which have been cited, there were visitors with general powers; here the powers of the visitors are limited.

MARSHALL in reply. It was ſhown, in opening the cauſe, that this court can have no juriſdiction in a caſe of a private eleemoſynary inſtitution where viſitors with general powers are appointed. The authorities in ſupport of this poſition were too numerous to be oppoſed. But the counſel for Mr. Bracken inſiſts,

1ſt, That this is a public, not a private inſtitution.

2dly, That the viſitors have limited powers.

3dly, That, in putting down the grammar ſchool, they have exceeded thoſe powers.

I ſhall anſwer theſe in their order: And,

I. This is a private, not a public inſtitution.

In the caſe of *Philips and Bury* reported by *Lord Raymond*, and *Comberbach*, Lord Holt ſays, "There are two ſorts of corporations aggregate, 1ſt, For public government, 2d, For private charity. That for public government, as Mayor and citizens &c, is ſubject to the common law; *of ſuch there is neither founder or viſitor, nor patron.*" In the caſe before the court there is a founder and there are viſitors. It bears no reſemblance to a corporation of a mayor and citizens, which is the caſe of a public corporation put by lord Holt. According both to the affirmative and negative parts of the deſcription, this is a private and not a public inſtitution. The perſons who compoſe it have no original property of their own, but it belongs to the corporation. Its funds are meer charitable donations. It is then completely eleemoſynary. In many of the caſes, colleges and hoſpitals are claſſed together as private eleemoſynary corporations, ſubject to the will of the founder. There would ſeem to be no principle on which this college ſhould be placed in a different claſs of corporations from all other colleges. I will examine the points of difference made by the counſel for Mr. Bracken. It has been urged that the profeſ-

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fors have estates as professors, of which, upon general and correct principles of law, they ought not to be deprived, without a right to resort to this court.

But these estates are the gift of the founder. They are his voluntary gift. To this gift he may annex such conditions as his own will or caprice may dictate. Every individual, to whom it is offered, may accept or reject it; but if he accepts, he accepts it subject to the conditions annexed by the donor. He must take the gift *cum onere*. The condition annexed in private corporations is, that the will of the visitor is decisive; and, as lord Holt says, "if the founder directs no appeal, no appeal lyeth." That the masters have estates, as masters, cannot convert this into a public corporation; for all masters must have salaries as masters; in all charitable institutions something is given, which the professors, if there be any, receive as professors; and if this was the criterion of a public institution, there could be none private in their nature. But that this is not the criterion, I again refer to the cases which have been cited.

But the acts of Assembly giving certain duties to the college are relied on, as giving the government a right, by its courts, to supervise the disposition of those revenues.

The college was founded by William & Mary. Since its foundation, the bounty of Virginia has been added to that of the original founder. It is an established principle, that all annexed foundations follow, and are governed by the rules of the old foundation to which they are annexed.—1, *Black. rep.* 77, 87. The gift of any individual then, to a chartered corporation, is subject to the laws which control the original donation. That this gift was made by the public does not alter the case; because it is decided, that colleges of royal foundation are not different from those of private

foundation. Where the king has appointed visitors their power is precisely the same as where a private founder has appointed them. Of consequence, a donation to an old foundation, tho made by the public, is as subject to the fundamental law of the corporation, as the donation of an individual would be. But the charter it is said gives to the corporation a representative in the General Assembly, and the office of surveyor general: Which are subjects of public concern, and would justify the interference of the courts of law.

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It is true that these are subjects of public concern; but it does not follow, that they totally change the character of the corporation.

Their power to elect a member was taken from them by the present constitution of Virginia, which was before the abolition of the grammar school.

The office of surveyor general is an emolument given by the founder. Admitting this to be of public concern it cannot affect the case. They have not declined to appoint surveyors. The existence, or non existence of the grammar school does not affect those appointments. It is unconnected with them. As this mandamus is not applied for to compel the college to proceed to the election of a member to the general Assembly, or to the appointment of a county surveyor, the argument does not touch the case, unless it be intended to prove, that if a case can exist in which a mandamus might be awarded to the college, it may be awarded in any case; that if there be a power annexed to the corporation to do any one act which concerns the public, the whole corporation immediately changes its nature, and, from a private, becomes a public corporation. Unless the argument proves this, it proves nothing. It cannot prove this. There is no reason, in the nature of the thing, why the donation of an individual, subjected by him to particular conditions, shall be subjected to other conditions, because a public office is confered on the corpora-

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tion, to whom that donation was made. The interference of the court, ſo far as concerns the public office, produces no neceſſity, which I can diſcern, for their interference in points with which the public have nothing to do.

If the argument which would be drawn from theſe powers confered on the college be unſupported by reaſon, it will derive no weight from authority. No deciſion, no *dictum* aſſerting the principle, has been adduced. I believe none can be adduced. The contrary is laid down in 1 *Black. rep.* 83, 85, 86.

Then though a mandamus might lie to compel the election of a member of Aſſembly (had the power to elect one ſtill been retained) or of a county ſurveyor, yet it will not lie to compel the eſtabliſhment of a grammar ſchool, or the reſtoration of its maſter.

II. The objection, that the power of the viſitors is limited ſo that they are to be conſidered as ſpecial and not general viſitors, is not well founded.

The mere appointment of a viſitor, without any deſcription of his power, creates him a general viſitor, and gives him the power incident to the office, 1 *Black. rep.* 83. There being no ſet form of words for the appointment of a general viſitor let us enquire, whether thoſe uſed in the college charter are not ſufficient. The 9th ſection contains the appointment. It ordains and appoints Francis Nicholſon &c. Gentlemen, and their ſucceſſors "to be true, ſole and undoubted viſitors "and governors of the ſaid college for ever." It gives them "power to make ſuch rules, laws, ſta-"tutes orders, & injunctions, for the good & whole-"ſome government of the college, as to them and "their ſucceſſors ſhall, from time to time, accord-"ing to their various occaſions and circumſtances "ſeem moſt fit and expedient."

Unqueſtionably then they were general viſitors with all the powers incident to that office.

Bracken, vs College.

If I have been ſucceſsful in proving that the college of William and Mary is, ſo far as concerns he grammar ſchool, like all other colleges, a private corporation, and that its founder has given it general viſitors, there is an end of the queſtion oncerning the mandamus. This court has clearly no juriſdiction of the caſe, and from the acts of he viſitors there is no appeal.

But if I ſhould be miſtaken in this, it will beome neceſſary to enquire,

III. Whether the viſitors have or have not exeeded their authority?

I contend that they have not.

Much argument has been uſed to prove, that he viſitors are bound by the college charter.

That is a poſition I never deſigned to contravert.

If the acts of the viſitors are at all examinable in his court, none can be ſupported which tranſcend he limits preſcribed for them in the charter which ives them being, and from which their power is rawn. The enquiry is, What are thoſe limits? : is unneceſſary to examine the whole ſta ute of 779. It is only material to defend that part of which puts down the grammar ſchool. With ſpect to this, the whole operation of the ſtatute to commute a ſchool for ancient languages into ſchool for modern languages. Was this within ie power of the viſitors?

The charter gives them the power of making ich laws for the government of the college as to iem ſhall ſeem proper. Sect. 9.

Bracken, *vs.* College.

But it is contended that this gives them only the power of making laws for the government of the college as conſtituted, and not, in any manner, to change its organization. I admit that it can give no power to change that which is eſtabliſhed by the charter. But the grammar ſchool is not eſtabliſhed by the charter. In its firſt ſection, power is given to the truſtees "to erect, found and eſtabliſh, a certain place of univerſal ſtudy, or perpetual college for divinity, philoſophy, languages and other good arts and ſciences, conſiſting of one preſident, ſix maſters or profeſſors &c. according to the ſtatutes and orders of the ſaid college to be made, appointed and eſtabliſhed upon the place by the ſaid Francis Nicholſon &c." It is then only made neceſſary by the charter, that there ſhould be a preſident and ſix profeſſors: and, perhaps, that divinity, philoſophy and the languages ſhould be taught in the college. This requiſition of the charter, if it be one, is as well ſatisfied by teaching the modern as the ancient languages.

But it is urged, that the truſtees, in forming the ſtatutes which ſhall regulate the preſident and maſters, act as truſtees or founders, and not as viſitors, becauſe the power is given to them only, and not to their ſucceſſors. This is true; but I cannot admit the inference which is drawn from it. That inference is, that having once executed their power, by conſtituting the ſix profeſſorſhips, and having made to the college, ſo conſtituted, a transfer of the property veſted in them, the truſt was completely executed, and the profeſſorſhips, thus conſtituted, remained immutable.

Whatever might be the force of this argument, if the truſtees or founders had merely conſtituted the profeſſorſhips without any further declaration on the ſubject, it ſeems to me to have loſt that force in the caſe which has actually happened.

The truſtees, in the very moment of paſſing the

ſtatute for the organization of the college, declare that the viſitors may entirely cut off ſome ſalaries, and that they reſerve to the viſitors the power of making new ſtatutes, or of changing thoſe made by the truſtees, as their affairs and circumſtances ſhall, from time to time, require. This declaration precedes the tranſer, and the property is taken under the operation of this ſtatute.

The truſtees, it is ſaid, could only have deſigned a change, as to ſuch offices as did not compoſe one of the ſix profeſſorſhips, required by the charter; but the expreſſion of the truſtees is general, and is not now to be reſtrained by this court.

It is ſaid that, having executed the truſt, they could not tranſmit to the viſitors the power of altering that, which was eſtabliſhed by themſelves.

This deſerves a ſerious conſideration.

The truſtees are ſomething more than meer truſtees for the conveyance of property to an exiſting corporation, or to one the crown was about to create. They are empowered to found a college, lege, and are entruſted with property with which to endow the college they ſhall have founded. They have then the power of founders, ſubject only to that reſtriction which the charter impoſes on them. As founders, they might authoriſe the viſitors to make any alterations within the limits of the charter. The alteration I contend does not exceed thoſe limits, becauſe languages are ſtill taught in the college.

Let it be true, that a Court of Chancery would have decreed the truſtees to have executed their truſt by a conveyance of the property to the college, yet a court of equity would not have decreed them to have relinquiſhed any diſcretion which they poſſeſſed as founders, and which was compatible with the charter.

Bracken. vs College.

It cannot be admitted to be true, that the maſters are independant of the viſitors; becauſe they, as well as the viſitors, are ordained by the charter. The charter expreſsly gives to the viſitors the power of legiſlating for, and governing the college. They have, with reſpect to the profeſſors, the power of appointment and the power of deprivation.

Nor is it to be admitted, that the maſters are appointed for life. This is no where declared in the charter or ſtatutes. The firſt preſident only is appointed in the charter, and there is no expreſſion which would ſhew, that the profeſſors are not removeable at the will of the viſitors. That they vote on their freehold is no proof of it; becauſe an eſtate which may endure for life, but is ſubject to be defeated, draws after it, many of the qualities of a life eſtate. The eſtate is attached to the office, not to the perſon; and, as the office may be held for life, the officer, like one who holds an eſtate during widowhood, has many of the privileges of a tenant for life. But it is contended, that, if they have the power of deprivation, ſtill Mr. Bracken ought to have been ſummoned, and for this *Bentley's* caſe is cited as reported in *Strange*.

To that corporation there was no viſitor. But that is not material as to the point I am now conſidering. There is however a material difference between the act we are now conſidering and that of which Doctor Bently complained. He was deprived of his office by a judicial act; the office of Mr. Bracken is put down by a legiſlative act. He was arraigned for miſconduct, and therefore ſhould have had notice that he might have defended his conduct; Mr. Bracken has not been complained of, but the college ſenate have deemed it for the intereſt of the college to change his office. If the act was within their power, it could not be neceſſary to give him notice, that they were about to perform it.

Concerning the case of Mr. Camm I know nothing certain, but am informed that the visitors consented to what was done.

Bracken, vs. College.

Mr Taylor is incorrect in stating that there were not a sufficient number of members in December 1779 to form a convocation.

I suppose it need not appear, on the proceedings, that every member was summoned, should it even be necessary (which I do not admit) that such should be the fact.

BY THE COURT.

Let it be certified that, *on the merits of the case*, the General Court ought not to award a writ of mandamus to restore the plaintiff to the office of grammar master and professor of humanity in the said college.

ACCOUNT.

1 A settlement of a public account by the Solicitor General in consequence of an order of the Executive, did not bind the claimant, altho he received some payments under the settlement. *Commonwealth*, vs. *Beaumarchais*. 122.

2. In an order of reference to a commissioner to take an account between the parties, all accounts between them ought to be settled.

Harris vs. *Magee*. 502.

AGENT.

1. If a merchant abroad writes to his correspondent here to buy grain for him and to draw bills for the amount, the agent here cannot exceed his powers, and if a third person sells again to the agent without a reference to the agency or to the principal, he cannot recover of the principal, altho the agent draw bills on the principal for the purchase money at the time of the sale. *Blane* vs *Proudfit*. 207

AGREEMENT.

1. A. agreed in consideration of £25,000 paper money, to be paid him by B. in the years 1780 & '81, to pay the latter £ 2,500 specie in 1790. The contract was obligatory.

Bracken vs *Griffin* 433.

Vide CONTRACT.

AMENDMENT.

1, If the right judgment be rendered in the county court and upon an appeal to the Di-strict Court the clerk sends up an erroneous record, on which the judgment is affirmed; this court will, upon a view of the record of the County Court, reverse that of the District Court, and direct them to issue a writ of *certiorari* for the true record; so that the right judgment may be given.

Williams vs *Strickler*. 230.

2. The declaration may be amended after a trial, and a juror withdrawn.

Jude vs *Syme*, 522

3. If in ejectment the demise be laid precedent to the plaintiffs title, it is cured by the act of jeofails.

Duval vs *Bibb*. 362

ASSUMPSIT.

1. The defendant in an action upon a settled account cannot go into an enquiry concerning the justice of the several items of demand stated in the account.

Lyne vs *Gilliat*. 5.

2. Loose conversations of the executor are not sufficient to raise an assumpsit.

Henderson vs *Foote*. 248

ATTORNIES.

1. The 15 per cent damages are not recoverable against an attorney who receives the money of his client and fails

to pay it to him.
Taylor vs *Armistead.* 200

ATTACHMENT.

1. A magistrates attachment against an absconding debtor, can only issue from the county where he resided, or is actually found, at the time of issuing of it. *Barnet* vs *Darnielle* 413

2. As distress for rent cannot be made off the demised premises, an attachment, at the suit of a creditor against the tenant as an absconding debtor, served upon property found off the premises, will be prefered to the landlords claim for rent.
Mosby vs *Leeds.* 439

3. In an attachment against an absconding debtor, judgment should be first entered against the debtor, and then the garnishee should be ordered to pay it.
George vs *Blue.* 455

4. If the attachment demand only £44 15 5 and costs, the court cannot give judgment for interest. *ibid.*

AUDITOR.

1. An appeal lies, from the decision of the Auditor, to the courts in all cases.—*Commonwealth* vs *Beaumarchais* 122

AVERMENTS.

1. What averments are sufficient in a declaration.
Austin vs *Richardson.* 201

2. Where the defendant undertook to see money paid, he was bound to look to the performance without any notice of non payment from the creditor, and therefore it was not necessary to aver notice.
Ibid.

BILLS OF QUIA TIMET.

1. A. devises slaves to his wife for life, remainder to his children. The wife marries B, who empowers C. to sell the slaves; C does sell them to D, who was ignorant of the right of those in remainder, and D sells them to E. If the remaindermen bring a bill of *quia timet* against B, D & E, the court will decree B to give security for the forthcoming of the slaves at the death of his wife, but as D was a purchaser, without notice, he will not be compelled to give such security.
Chisholm vs *Starke.* 25

BILLS OF REVIEW.

Quere Whether the court of chancery can grant a bill of review to a decree of the court of appeals or of a county court, upon new matter discovered after the decree was made.
Currie vs *Burns.* 183

BILLS OF EXCHANGE.

If A purchase of B a foreign bill of Exchange, which is afterwards lost before it is presented, and B refuses to give a second bill, A may bring *indebitatus assumpsit* for the purchase money.
Murray vs *Carret.* 373

BONDS & OBLIGATIONS

1 Where a joint bond was given prior to the act of 1786 & after that act went into operation one of the obligors died, living the other, the obligation survived, and the executors of the deceased were exonerated. *Elliott* vs *Lyon*. 269

2 If an act of Assembly directs that a bond shall be payable to the Justices, and that the penalty shall be £ 1000. If the bond be taken payable to the governor, and the penalty be £ 10,000 and a suit is brought thereon by a succeeding governor for the benefit of a party injured, it cannot be sustained.

Stuart vs *Lee*. 428

3 A joint obligation survived before the act of 1786.

Watkins's ex. vs *Tate*. 521

4 If a forthcoming bond be not good as a statutary bond, it may be good as a bond at common law.

Johnston vs *Meriwether*

CAVEATS.

1 The party who caveats must shew a title to the warrant under which his own survey is made.

Currie vs *Martin*. 28

2 The Court of Appeals has jurisdiction in cases of caveat. *Ibid.*

3 Damages are not to be given upon affirmance of the judgment in cases of caveat.e

Hervey vs *Preston*. 495

4 A caveat is an equitable process and to be governed by equitable rules. *Ibid.*

CERTIFICATES.

1 The owner of particular certificates will be entitled to a decree for the certificates themselves if to be had, and if not, to their value at the time of the decree.

Alexander vs *Morris*. 89

CLERKS.

If a clerk of a court issue a writ of *scire facias* for too little, and the plaintiff obtains judgment and sues out execution for the sum in the *scire facias* he shall recover against the clerk in a subsequent action the difference between the true sum for which the *scire facias* ought to have issued and that for which it did issue, nor will it make any difference whether the special verdict finds special damage sustained by the plaintiff or not.

Russell vs *Clayton*. 41.

COMMISSIONERS.

The county were not entitled to £ 20 besides their fees for services in the years 1787, '88 & '89.

Commonwealth vs *Garth*. 6

CONTRACTS.

1, One contracting on behalf of the state is not liable in his individual capacity.

Tutt vs *Lewis*. 233.

Vide AGREEMENTS.

CONVEYANCES.

1 If the bargainor continue in possession after the conveyance, that possession will not

render a conveyance void.
Duval vs *Bibb*. 862
2 *Quere*. Whether a feoffment by out one of poſſeſſion is not void?
M'Lean vs *Copper*. 367
3 If the verdict does not find title or poſſeſſion in the grantor, he can convey neither; and therefore his grantee cannot maintain an ejectment againſt the tenant in poſſeſſion. *Tabb* vs *Baird*. 475
4 *Quere*. Whether a deed of bargain and ſale by one out of poſſeſſion is not void? *Ibid*
5 If a grant be made reſerving a yearly rent, with a condition that the grantor may re-enter if the rent be not paid and no property is found on the land whereof diſtreſs can be made, the grantor upon demand made, and failure to pay, may reenter if there be no effects found, and grant to an other.
Wartenby vs *Moran*. 491

COVENANTS *Vid*. LEASE.

DAMAGES.

1 If the defendant appeal from a decree of the High Court of Chancery on a forthcoming bond, the court of appeals may allow 10 per cent damages for retarding the execution.
Skipwith vs *Clinch*. 86
2 On a bond with a collateral condition, the jury may find more damages than are laid in the declaration.
Johnſon vs *Meriwether*. 523
3 In debt on a bond damages need not be laid in the declaration or found by the jury.
Taylor vs. *M'Lean*. 557

DESCENTS.

1 By the act of 1792, the perſonal eſtate was diſtributable among the perſons entitled to the realty; and therefore the mother of a deceaſed infant was not entitled to any part of his perſonal eſtate derived from the father.
Tomlinson vs *Dillard*. 106
2 The act of '85, concerning deſcents, was reſtored by ſuſpending acts of 1792.
Haraison vs *Allen*, 289.

DETINUE.

1. In detinue, if the jury find for the plaintiff, the ſlaves if to be had, or £ 250 for each ſlave and 1d damages, and the court render judgment for the ſlaves if to be had, and if not, then the price found by the jury, with the damages and coſts, it is not error.
Bates vs *Gordon*. 555

DEVISES.

1. By a deviſe of the reſidue, emblements, growing on land ſpecifically deviſed to another, will paſs.
Fleming vs *Bolling*, 75
2. The teſtator deviſes that his book ſhall be given up to A. and that he ſhall receive all the debts due, and pay all the teſtator owes; this is an appointment of A. to perform the office of an executor, but

does not entitle him to the ſurplus of the debts due the teſtator, nor does it diſcharge him from a debt which he owed himſelf.

Fleming vs *Bolling*, 75.

3. What paſſes under a reſiduary deviſee.

Read vs *Payne*, 225.

4. The act of 1785 only gives a power to deviſe after acquired lands, leaving it to the diſcretion of the teſtator to diſpoſe of them or not, and therefore it muſt appear that the deviſe evidently contemplated them, or they will not paſs.

Harriſon vs *Allen*. 229.

5. Reaſon of the difference between them and perſonals. *Ibid.*

6. What words paſs a fee in a will.

Watſon vs *Powell*, 306.

7. The word *Eſtate*, in the preamble of the will, may be incorporated into the deviſe, ſo as to paſs a fee. *Ibid.*

8. Deviſe of land to J. H, and his heirs; but if J. H. dies without a lawful heir, remainder over to R. H. and his heirs, creates an eſtate tail in T. H: which, by the act of aſſembly for docketing entails, is turned into a fee ſimple.

Hill vs *Burrow*, 342.

9. If the title of the heir be abated by a ſtranger, he cannot deviſe it before entry.

Hall vs *Hall*, 488.

10. E. P. deviſes a ſlave to her daughter for life, and if ſhe die before my ſon J. P. then to be given to my ſon J. After which ſhe gives the remainder part of her eſtate to be equally divided among her four children T, J, M, & S. It ſeems that the remainder of the ſlaves paſſes.

Crump vs *Dudley*, 507.

DISTRIBUTION.

When in dividing ſlaves, it cannot be conveniently done without ſeparating infant children from their mothers, compenſation may be made in money.

Fitzhugh vs *Foote*, 13.

DOWER.

Vide LEGACIES, 1.

1. An aſſignment of dower in lands and ſlaves, by order of the county court on a motion only, and without any ſuit for that purpoſe, will not be ſet aſide after a great length of time, but the inequalities and exceſs only corrected.

Fitzhugh vs *Foote*, 13.

2. Wife not entitled to money, ariſing from land ſold by the huſband during his life-time, in lieu of dower. *Ibid.*

3. The heir cannot maintain an action for a treſpaſs committed on the quarantine lands of the widow before aſſignment of dower.

Latham vs *Latham*, 181.

EQUITY.

1. Where equity is equal the law muſt prevail.

Johnston vs *Brown*, 259.

2. If A. have ſuch an equity as would, on a caveat prior to the grant, have entitled him to a preference, it will be no ground for a bill to ſet aſide the patent, unleſs he was prevented by fraud and accident from proſecuting a caveat. *Ibid.*

3. A contract will not be ſuſpended in equity till a tort is tried. *Harris* vs *M'Gee* 502

4. If A. agree to furniſh B. with goods at 85 per cent on the prime coſt payable in tobac co at the market price, and B. being informed of the prices, take ſome and reject others, and ſeveral ſettlements are made, and a bond taken for the balance; yet if B. afterwards diſcovers, that A. laid an advance upon the goods before they were ſhipt, and that the tobacco was credited at 10 or 15 per cent leſs than the ſelling prices, a court of equity will grant relief.

Broddus vs *M'Call*, 546.

EVICTION.

Vide PAPER MONEY, 1.

1 If the title to lands conveyed with warranty, be evicted, the value at the time of eviction is the rule for compenſation. *Mills* vs *Rill*, 320.

EVIDENCE.

1. Where the auditor draws a warrant in favor of any perſon, the court will preſume payment by the treaſurer unleſs the warrant be produced, or the payee otherwiſe diſcharge himſelf of the receipt.

Commonwealth vs *Garth*, 6.

2. The aſſignee of a promiſſary note, negotiable at the bank of Alexandria, cannot offer it as a diſcount to a ſuit brought againſt him by the aſſignee, upon a note in writing to deliver to the plaintiff wet goods and groceries to a certain amount.

Mandeville vs *Patten*, 9.

4. If in a ſuit upon a bond with condition that if the plaintiffs ſhall be caſt in two ſuits then depending, the obligor will pay &c, It appears that the plaintiffs had inſtituted ſuits upon adminiſtration bonds, this evidence will maintain the declaration.

Mackey vs *Fuqua*, 19.

5 If the anſwer admits dealings, and the commiſſioner reports a balance due without exceptions before him, or in the Court of Chancery, the defendant cannot object in the Court of Appeals that there was no evidence of the debt. *Brewer* vs *Haſtie*, 22.

6. *Quere.* Whether a depoſition taken after a cauſe is decided, but during the ſame term, can be brought in before the end of the term, and made part of the record.

Bullock vs *Goodall*,

6. Evidence of a parol gift of slaves may be received, in order to prove five years possession, so as to bar the plaintiffs demand.

Jordan vs *Murray* 85.

7. A deposition, taken after an appeal from interlocutary decree in Chancery, may be read upon the hearing of the appeal.

Alexander vs *Morris*, 90.

8. The written instrument is in general to be resorted to, in order to ascertain whether the contract was for specie or paer. *Commonwealth* vs *Beaumarchais*, 122.

9. It is a general rule that parol evidence is not admissible to explain the ambiguities of a deed.

Gatewood vs *Burrus*, 194.

10. How far evidence *de hors* the deed may be received.

Herbert, vs *Wise*. 239

11. *Vide* TENDER AND REFUSAL 1.

12. Loose conversations of the executor are not sufficient to raise an assumpsit.

Henderson vs *Foote*, 248.

13. *Quere*: Whether a declaration on the assumpsit of the testator can be supported by evidence of an assumpsit by the executor. *Ibid.*

14. *Vide* REPORTS in CHANCERY, 1, 2.

15. A survey annexed to the record and not excepted to in the court below, will be considered as admissible in this court: The more especially, if accompanied by the surveyors deposition.

Johnston vs *Brown*, 259.

16. Variance, between the arbitration bond declared on, and that recited in the award, is not fatal.

Ross vs *Overton*, 309,

17. *Semble*, that a deposition taken under a commission, awarded before the bill was filed, and executed by two persons of whom one was not a magistrate, may be read in a subsequent suit.

Thornton vs *Corbin*, 384.

18. In an action for a malicious prosecution in a foreign country, it is not indispensably necessary to produce a copy of the record of the proceedings there, but the plaintiff may prove them by other evidence.

Young vs *Gregory*, 446.

19. If the answer denies imposition, and is supported by the report of the commissioner and the acknowledgment of the plaintiff that the debt is just, it will not be set aside by loose conversations.

Harris vs *Magee*, 502.

20. If an administrator brings detinue, he is not bound at the trial to produce the certificate for his obtaining letters of administration, unless he receives notice that

it will be required.
Hughes vs *Clayton*, 554.
21. Evidence of a communication between the father, and his daughters deceaſed huſband, as to the conſideration on which a parol gift for ſlaves was founded, may be left to the jury. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

1. What words will make the deviſee executor.
Fleming vs *Bolling*, 75.
2. *Vide* VERDICT.
3. *Que:* Whether an adminiſtrator can pay off a debt due by judgment againſt his inteſtate, on which ſaid judgment an execution had iſſued, after a ſcire facias, made known to him, to revive a judgment obtained againſt his inteſtate in his life.
Goosely vs *Holmes*, 424.

EXECUTIONS.

1. If the ſheriff, at the requeſt of the plaintiff, neglects to return an execution, he is not liable to a fine.
Bullock vs *Goodall*, 44.
2. *Quere:* How far a court ought to go in impoſing a fine upon a ſheriff for not returning an execution. *Ibid.*

EXPOST FACTO LAWS.

The act of 1786, relative to joint obligations, does not operate retroſpectively.
Elliot vs *Lyell*, 269.

FACTOR.

1. A Factor, indebted to his principal at the time, cannot ſell the property of the principal, to pay endorſements in the courſe of his factorage.
Alexander vs *Morris*, 89.
2. Nor can a Factor buy up the debts of his principal at an under rate, and claim credit for the nominal amount; but in ſuch a caſe he will only be allowed what he actually paid, although the purchaſe was made after the factorage had ceaſed and the principal had brought ſuit for an account. *Ibid.*

FEME COVERT.

1. If a feme covert be privily examined, her covenant for further aſſurance is obligatory; and a ſpecific execution will be decreed againſt herſelf if living, and againſt her heirs, if ſhe be dead.
Nelson vs *Harwood*, 394.

FOREIGNER.

A Foreigner who came here and contracted with the government, during the paper money age, is bound by the act eſtabliſhing the ſcale of depreciation. *Commonwealth* vs *Beaumarchais*, 122.

FINES.

1. *Vide* EXECUTONS, 1.
2. Exceſſive Fines are unconſtitutional.
Bullock vs *Goodall*, 44.

FORTHCOMING BONDS.

A Forthcoming bond given by the defendant only, without any ſecurity, is good, and will ſupport a motion.

Waſhington vs *Smith*, 13.

FRAUD.

Under the circumſtances, the wifes conveyance of her property before marriage was ſupported againſt her huſband.

Crump vs *Dudley*, 507.

HEIR.

If in a ſuit againſt the heir, he pleads a plea, confeſſing aſſets without ſetting them forth in certain, and the plea is found againſt him, the plaintiff is entitled to judgment.

Copoon vs *Purdie*, 431.

INTEREST.

Intereſt during the war deducted from a debt due a Britiſh ſubject reſident abroad.

Brewer vs *Haſtie*, 22.

INSOLVENT DEBTOR.

In what order debts due from an inſolvent debtor who is living, are to be paid.

Tinsley vs *Anderſon*, 329.

JOINDER IN ACTION.

The executors of two deceaſed obligors cannot be joined in the ſame action.

Watkins ex'rs vs *Tate*, 521.

ISSUE.

If there be two iſſues, and the jury are ſworn to try the iſſue, it is not error.

Mackey vs *Fuqua*, 19.

JUDGMENTS.

A ſuit in this court, which has been diſmiſſed by miſtake, may be redocketed at a ſubſequent term.

Thornton vs *Corbin*, 221, 232

JURISDICTION.

1. *Vide* AUDITOR, 1.
ACCOUNT, 1.
CAVEAT, 2.
LEGISLATURE, 1.

2. If the matters in diſpute between the parties exceed 100 dollars, this court has juriſdiction, although the decree in the Court of Chancery was for leſs than that ſum.

Minor vs *Goodall*, 393.

3. Where the officer neglects to return the facts, ſo that they do not appear on the trial at law, a court of equity may grant relief.

Mosby vs *Leeds*, 443.

4. This court has no criminal juriſdiction, and therefore no appeal lies to it from a judgment of the Diſtrict Court for a miſdemeanor.

Bedinger vs *Com'nwealth* 461.

5. What juriſdiction a court of equity may exerciſe after a trial at law.

Barret vs *Floyde*, 531.

LANDS.

1. *Quere:* What certainty is required in an entry for lands? *Currie* vs *Martin*, 28.

2. Old ſurveys were often inaccurate, and miſtakes often made in copying their deſcriptions into patents, leav-

ing out poles, and putting North for South and East for West. Therefore juries, uniformly and wisely, have never suffered the marked lines, when proved, to be departed from, because they do not agree exactly with descriptions in conveyances.

Herbert vs *Wise*, 242.

3. The entry is not a legal title, but it is only the first step towards acquiring waste lands.

Johnston vs *Brown*, 259.

4. The survey is only a progressive legal step, but it is the grant only, which passes the legal title. *Ibid.*

5. There are periods after which the court will presume notice by the surveyor, and a dereliction of the entry by the party. *Ibid.*

6. *Quere*: Whether an entry for lands, "between his fathers land and the Widow Bells," is too vague? *Ibid.*

7. If the lands surveyed be not within the description of the entry, a subsequent locater shall not be postponed by this survey made at a time future to his own entry and survey, especially if he has obtained a grant. *Ibid.*

Vide EVIDENCE.

8. G. in 1770 surveyed and took a patent for a tract of 160 acres of land, the lines whereof were all surveyed except two, which were the lines of A. H. forming a small angle of 26 acres, and which in the patent and survey of G. were thus described, "thence along And: Henry's line 188 poles to the beginning." This survey and patent are good, and entitled G to a preemption in the 26 acres.

Stever vs *Gillis*, 417.

9. The time of the return of the survey into the land office is the period from whence the six months for entering a caveat are to be calculated; and, in such a case, the caveatee must shew the fact.

Harvey vs *Preston*, 495.

10. A caveat lies to an inclusive survey, although there be no certificate from the county court that it is reasonable. *Ibid.*

11. The act of Assembly, concerning inclusive surveys, does not extend to lands held by entry only. *Ibid.*

12. No entry can be made under a warrant which is exhausted by prior entries. *Ibid.*

13. If a patent be issued by the Lieutenant Governor, it will be presumed the Governor was absent. *Ibid.*

LEASES.

If O. leases a mill and premises to R, who covenants to leave them in repair, and the mill is carried away during the lease by ice, R. is bound nevertheless to pay the

rents and perform the covenants.

Ross vs *Overton*, 309.

LEGACIES.

1. A widow taking a legacy under the will shall abate in proportion with the other legatees.

Jett vs *Bernard*, 11.

2. A legatee cannot recover a slave devised to him without proving the assent of the executor to the legacy.

Hairston vs *Hall*, 218.

LEGISLATIVE CONSTRUCTION,

1. Is intitled to respect, but would not bind the court to adopt the same construction, contrary to their own judgment in relation to prior cases. 360.

LEGISLATURE.

A rejection, by the Legislature, of a claim against the state is no bar; but the creditor may, notwithstanding, apply to the auditor, and, if refused, appeal to the courts.

Com. vs *Beaumerchais*, 122.

LIMITATION OF SUITS AND ACTIONS.

1. If in assumpsit the defendant plead the act of limitations, & the plaintiff would avoid the plea by a former suit having been brought he must reply, the former suit specially, and cannot give it in evidence under a general replication to the plea.

Bogle vs *Conway*, 1.

2. If there be a limitation in a deed of slaves to the donors daughter for life, and after her death to the heirs of her body, to the only proper use and behoof of such heirs, their executors, administrators or assigns. *Quere:* What estate the daughter takes?

Bradley vs *Mosby*, 50.

3. Evidence of a parol gift of slaves may be received in order to prove five years possession, so as to bar the plaintiffs demand.

Jordan vs *Murray*, 85.

4. *Vide* SUPERSEDEAS, 1.

5. The act of limitations will not bar a motion against a sheriff for clerks tickets put into his hands to collect.

Lee vs *Peachy*, 220.

6. In ejectment a man cannot object his own possession for twenty years against his own deed within that period.

Duval vs *Bibb*, 362.

7. A new assumpsit for a store account, barred by the six months act of limitations, binds the debtor.

Beal vs *Edmondson*, 514.

8. If two indorse a bill of exchange, and one of them having taken a deed for the whole estate of the drawer in trust for the payment of his debts, which proving insufficient to pay the whole of the bill, he gives his own bond to the holder for the balance, he cannot bring suit against the

other for the moiety of the balance until the bond is paid, and consequently the act of limitation does not begin to run till then.

Lomax vs *Pendleton*, 538.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution it is not sufficient to alledge that the defendants did it without any cause, but the declaration must state that it was done without any probable cause.

Ellis vs *Thilman*, 3.

2. In an action for a malicious prosecution, the declaration must aver the want of probable cause, and it is not sufficient to say that it was done without any legal or justifiable cause.

Young vs *Gregory*, 446.

MANDAMUS.

A writ of mandamus will not lie in the case of private eleemosynary foundation, if there be a visitor.

Bracken vs *College*, 573.

MARRIAGE CONTRACT

A parol marriage contract, made before the act of 1785, was supported against a subsequent voluntary conveyance.

Thornton vs *Corbin*, 384.

MARINERS WAGES.

A mariner who quits the ship after the capture, without the assent of the owners, or having been forced to do so by the captors, is not entitled to wages, to the time of the capture,

Cavan vs *Martin*, 228.

NEW TRIAL.

A court of equity will not grant a new trial merely because the judges thought that the weight of evidence was against the verdict.

Ross vs *Pines*, 568.

OFFICES.

A bond for the sale of an office is void.

Noel vs *Fisher*, 215.

PAPER MONEY.

1. Where the title to part of the lands purchased during the paper money age, but not conveyed, was evicted, and owing to the neglect of the purchaser, in not punctually paying some of the last instalments, the vendor's executor was prevented from purchasing the evicted lands, this court decreed a conveyance of the lands not evicted, and proportioned the loss, arising from the eviction, upon the whole purchase-money, instead of making the vendors estate liable for the value of the land at the time of eviction, which latter would have been the rule, if there had been a conveyance with warranty.

Mills vs *Bell*, 320.

2. A. agreed in consideration of £25,000 paper money, to be paid him by B. in the year 1780 & '81, to pay the latter £2,500 specie in 1790,

the contract was obligatory.
Bracken vs *Griffin*, 433.
PLEADINGS.
The general plea of *non assumpsit within 5 years* relates to the time of pleading the plea.
Henderson vs *Foote*, 248.
POINTS OF LAW.
An instruction of the court to the jury that a deed was sufficient to satisfy the averments in the declaration is not error.
Austin vs *Richardson*, 201.
POSSESSION.
Vide CONVEYANCES.
DEVISE.
RE-ENTRY.
If a grant be made, reserving a yearly rent, with a condition that the grantor may re-enter if the rent be not paid and no property is found on the land whereof distress can be made, the grantor upon demand made and failure to pay, may re-enter.
Wartenby vs *Moran*, 491.
RENTS.
Vide RE ENTRY.
1. Distress for rent cannot be made off the demised premises.
Mosby vs *Leeds*,
REPLEVY BONDS.
1. In a three months replevy bond, the condition ought to have stated that the property was restored to the debtor.
Glasford & co. vs. 193.
2. The act of Assembly does not give a motion on a three months replevy bond against executors. *Ibid.*
REPORTS IN CHANCERY
1. If the answer admits dealings, and the commissioner reports a balance due, without exception before him or in the Court of Chancery, the defendant cannot object in this court that there was no evidence of the debt.
Brewer vs *Hastie*, 22.
2. After two references to commissioners appointed by the county court to settle an administration account, and one reference to a commissioner of the high court of chancery, no exception for the want of credits will be allowed here, which was not made at one of those examinations.
Jones vs *Watson*, 253.
REVOCATION.
Vide WILLS.
SATISFACTION.
1. If several small promisary notes be given for a large one, it is no satisfaction unless they are paid; and therefore suit may be brought on the large one notwithstanding.
M'Guire vs *Gadsby*, 134.
SECURITIES.
1. A security to a bond, prior to the act of 1794, is not absolved from the obligation by requesting the obligee to sue and his failing to do so.
Croughton vs *Duval*, 69.
SECURITIES ON APPEALS.

2. Rule as to time when objections to the ſufficiency of the ſecurity to appeal bonds is to be made.

Johnston vs *Syme*, 523.

3. It was not held a ſufficient objection to the ſecurity to the appeal bond that he was ſecurity to the injunction bond alſo. *Ibid.*

SEQUESTRATION.

1. A ſequeſtration is proper if the defendant obſtinately lies in jail to ſave his eſtate, or exhauſts it in paying other creditors to the injury of the plaintiff.

Ross vs *Colville*, 382.

2. *Quere*: If an appeal lies to this court, from an order of the Court of Chancery awarding a ſequeſtration. *Ibid.*

SLAVES.

1. Although, under the act of 1758, evidence of a parol gift of ſlaves cannot be given, yet ſuch teſtimony may be received, in order to prove five years poſſeſſion ſo as to bar the plaintiffs demand.

Jordan vs *Murray*, 85.

SPECIFIC PERFORMANCE.

1. Where the title to part of the land purchaſed during the paper money age, but not conveyed, was evicted, and owing to the neglect of the purchaſer, in not punctually paying ſome of the laſt inſtalments, the vendors executor was prevented from purchaſing the evicted lands, this court decreed a conveyance of the lands not evicted, and proportioned the loſs ariſing from the eviction on the whole purchaſe money, inſtead of making the vendors eſtate liable for the value of the lands at the time of the eviction, which would have been the rule if there had been a conveyance with warranty.

Mills vs *Rill*, 320.

2. Equity will not relieve againſt a purchaſe if the ſeller, at the time of the decree, has it in his power to make a good title, although he was not able to do ſo at the time of the contract.

Syme vs *Johnston*, 558

STATUTES.

1. Where the words of a ſtatute are plain, the court cannot indulge any latitude of conſtruction, but muſt purſue the words.

Tomlinson vs *Dillard*, 106.

STERLING MONEY.

1. It is neceſſary on judgments for ſterling money that the court ſhould fix the rate of exchange.

Taylor vs *M'Lean*, 557.

SUPERSEDEAS.

1. The Judges order for a writ of ſuperſedeas is the true commencement of the proceedings here, and therefore if that be within five years from the date of the judgment, although the writ is not taken

out till the five years have elapsed, it will be in time.
Overstreet vs *Marshall*, 192.

SURPRIZE.
Vide JUDGMENTS.

TENDER & REFUSAL.
1. As upon a plea of tender the money must by law accompany the plea, the defendant in a subsequent suit may plead the tender of the money into court, in the first action, and prove by parol evidence the payment to the clerk; which, if found for him, will entitle him to judgment.
Robinson vs *Gaines*, 243.

TRESPASS.
1. The heir cannot maintain an action for a trespass on the quarantine lands of the widow, before assignment of dower.
Latham vs *Latham*, 181.

TRIAL.
1. The defendant may be ruled to trial in the county court at the first term after the office judgment.
Mandeville vs *Mandeville*, 225

VARIANCE.
1. Variance between the date of the arbitration bond declared on, and that recited in the award, is not fatal, if they agree in every other particular, that is to say if the bond declared on have the month blank, and the award recites the month, it will not be fatal if the bonds agree in every other respects.
Ross vs *Overton*, 309.
2. A variance between the declaration and the evidence is error.
Berkley vs *Cook*, 309.

VERDICT.
1. The verdict should find precisely whether there was livery of seizin: Therefore merely finding the memorandum endorsed upon the deed was but evidence of the fact, and insufficient; for which reason a new trial was awarded.
M'Lean vs *Copper*, 367.
2. A venire facias de novo awarded because the verdict was uncertain as to the quantity of assets in the defendants hands.
Goosely vs *Holmes*, 424.

WILLS.
1. An exparte affidavit of a witness to the will stating matters not appearing in the will is no evidence, and ought not to be recorded.
Read vs *Payne*, 225.
2. If, since the act of 1792, and before that of 1794, concerning wills, a man having children makes a will and devises his whole estate among them, after which he marries a second wife by whom he has children, and dies without altering his will, the second

marriage and birth is no revocation of the will.

Yerby vs *Yerby*, 334.

3. *Quere:* If the court of probate could have decided whether the will was revoked or not? *Ibid.*

4, Circumſtances may rebut an implied revocation. *Ibid.*

WILLIAM & MARY COLLEGE.

1. The viſitors have power to change the ſchools and put down profeſſorſhips.

Bracken vs *W. & M. College*, 573.

WITNESS.

1. If one, as agent for another, purchaſe a bill of exchange, and endorſes it to his principal, the latter may call the agent as a witneſs, if he firſt prove that he was only agent, or give him a releaſe. *Murray* vs *Carrot* & co. 373.

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